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NATURAL LAW.

COURSE OF LECTURES

ON

BY T. RUTHERFORD, D.D. F.R.S.

NATURAL LAW.

THIRD EDITION.

Printed for WILLIAM JOHNS, Bookseller,  
and Stationer, in the Strand, London.  
MDCCLXXIII.



INSTITUTES  
OF  
NATURAL LAW:

Being the substance of a  
COURSE OF LECTURES  
ON  
*Grotius de Jure Belli et Pacis,*

READ IN S. JOHN'S COLLEGE  
CAMBRIDGE.

---

BY *T. RUTHERFORTH*. D.D. F.R.S.  
ARCHDEACON of ESSEX, &c. &c. &c.

---

VOL. II.

In which are explained,  
THE RIGHTS AND OBLIGATIONS OF MANKIND, CONSIDERED  
AS MEMBERS OF CIVIL SOCIETIES.

THIRD EDITION.

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Whitehall:

PRINTED FOR *WILLIAM YOUNG*, BOOKSELLER  
AND STATIONER, N. 52 SOUTH SECOND-STREET,  
PHILADELPHIA.

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NATURAL LAW.



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# CONTENTS of VOL. II.

## CHAP. I.

Of societies in general where all  
the members are equal.

I.	<i>A society what</i>	pag.	13
II.	<i>What acts of a society bind its members</i>		13
III.	<i>Upon an equality of votes nothing is done</i>		15
IV.	<i>Natural majority what, and how to be reckoned</i>		18
V.	<i>Absent members have a right to vote by proxy</i>		21

## CHAP. II.

Of civil society its nature and origin.

I.	<i>Civil society what</i>		23
II.	<i>The motives, which lead man to form civil societies</i>		24
III.	<i>All mankind are not one civil society</i>		26
IV.	<i>The manner of forming civil societies</i>		28
V.	<i>Occasions of forming civil societies</i>		31
VI.	<i>How men become members of civil societies</i>		40
VII.	<i>Members of civil society not to leave it with- out consent of the public</i>		44
VIII.	<i>How far allegiance to a civil society is due from its banished members</i>		49

## CHAP. III.

Of civil power.

I.	<i>Civil power is legislative or executive</i>	-	52
II.	<i>Origin of civil power</i>	-	53
III.	<i>Legislative power implies a power of altering and of repealing laws.</i>	-	53
IV.	<i>Legislative power implies a power of enacting penalties.</i>	-	54
V.	<i>Legislative power implies a power of taxing the subjects</i>	-	56

## CONTENTS.

VI.	<i>Executive power is either external or internal or mixed</i>	58
VII.	<i>Judicial power is internal executive power</i>	59
VIII.	<i>External executive power or military power</i>	62
IX.	<i>Appointment of magistrates is mixed executive power</i>	67
X.	<i>Prerogative what</i>	69
XI.	<i>Civil and military force how distinguished</i>	72

## CHAP. IV.

### Of the different forms of civil government.

I.	<i>Sovereign and supreme power what</i>	75
II.	<i>Legislative and executive power compared</i>	77
III.	<i>Civil constitution what</i>	80
IV.	<i>Origin of civil constitution in respect of the legislative</i>	81
V.	<i>How a civil constitution becomes fixed as to the legislative</i>	90
VI.	<i>Executive body how formed</i>	96
VII.	<i>Despotic constitution how produced</i>	98
VIII.	<i>Executive body how fixed</i>	99
IX.	<i>National constitution a question of fact</i>	101
X.	<i>Monarchical constitutions not more natural than others</i>	103
XI.	<i>Monarchical constitutions not impossible</i>	105
XII.	<i>Constitutions not necessarily democratical</i>	115
XIII.	<i>Titles or appearances do not determine the nature of a constitution</i>	138
XIV.	<i>Tenure of civil power to be distinguished from the power itself.</i>	140
XV.	<i>Promise or oath of a king may limit his power</i>	149
XVI.	<i>Mixed constitutions</i>	154
XVII.	<i>Civil constitutions may be altered</i>	155

## CHAP. V.

### Of the changes, which are produced in the rights of individuals by civil union.

I.	<i>Rights of mankind how changed in civil society</i>	156
II.	<i>Right of private defence how restrained in a state of civil society</i>	157



# CONTENTS.

III.	<i>Origin and nature of civil jurisdiction</i>	165
IV.	<i>How civil jurisdiction ceases</i>	171
V.	<i>Right of defence where civil jurisdiction ceases in fact</i>	173
VI.	<i>Right of defence where civil jurisdiction ceases of right</i>	180
VII.	<i>Right of reparation how subjected to civil jurisdiction</i>	183
VIII.	<i>Civil jurisdiction in respect of reparation cannot cease in fact</i>	185
IX.	<i>Right of punishing how restrained by civil jurisdiction</i>	187
X.	<i>Difference between jurisdiction in matters of damage and of punishment</i>	190
XI.	<i>Right to punish how vested in the civil magistrate</i>	193
XII.	<i>How far civil jurisdiction may cease in respect of the right to punish</i>	195
XIII.	<i>Natural principles applicable to social punishment</i>	198
XIV.	<i>Actions not punishable by individuals may be punishable by magistrates</i>	199

## CHAP. VI.

### Of civil laws.

I.	<i>Difference between a civil law and a compact</i>	212
II.	<i>Constitutions established partly by law and partly by compact</i>	217
III.	<i>Internal and external obligation of civil law</i>	219
IV.	<i>A civil law obliges internally when it is made and promulgated</i>	222
V.	<i>The sanctions of civil law produce its external obligation</i>	222
VI.	<i>Penal sanctions not essential to civil laws</i>	223
VII.	<i>Proper matter of civil laws</i>	226
VIII.	<i>Matters of natural right and wrong may be matter of civil law</i>	228
IX.	<i>Civil laws not confined to matters of natural right or wrong</i>	232
X.	<i>Rights of mankind may be changed by civil laws</i>	235
XI.	<i>Effect of civil laws on promises, contracts, and oaths</i>	246
XII.	<i>What obligation to perform a void promise contract or oath</i>	254

# C O N T E N T S.

XIII.	<i>Effect of civil laws on the promises, contracts } or oaths of kings, who have legislative power }</i>	258
XIV.	<i>Effect of civil laws on marriage</i>	266
XV.	<i>Civil laws are written or unwritten</i>	283
XVI.	<i>Unwritten laws how established</i>	285
XVII.	<i>Unwritten law more difficult to be ascertained } than written law - - - }</i>	286
XVIII.	<i>Unwritten laws how repealed</i>	288
XIX.	<i>Written laws cannot be repealed by prescription</i>	288
XX.	<i>General division of laws</i>	290
XXI.	<i>In some constitutions the civil laws of succession } to the crown cannot be fundamental laws }</i>	292
XXII.	<i>Controverted succession may be settled by civil laws</i>	297

## C H A P. VII.

### Of interpretation.

I.	<i>Interpretation what</i>	300
II.	<i>Province of interpretation</i>	301
III.	<i>Three sorts of interpretation</i>	307
IV.	<i>Rules of literal interpretation</i>	307
V.	<i>Mixed interpretation where to be used</i>	311
VI.	<i>Three topics of mixed interpretation</i>	315
VII.	<i>Words are to be construed agreeably to the } subject matter - - - }</i>	315
VIII.	<i>Words are to be construed so as to produce a } reasonable effect - - - }</i>	316
IX.	<i>Words of a law or other writing are to be } construed by its circumstances - - }</i>	322
X.	<i>Strict and large interpretation what</i>	329
XI.	<i>Meaning of the writer how extended by ra- } tional interpretation - - - }</i>	331
XII.	<i>Meaning of the writer how restrained by } rational interpretation - - - }</i>	334
XIII.	<i>Scarce any laws but what naturally admit of } rational interpretation - - - }</i>	353

## C H A P. VIII.

### Of civil subjection and civil liberty.

I.	<i>General notion of subjection</i>	359
II.	<i>Subjection private and public</i>	360
III.	<i>Different degrees and sorts of private subjection</i>	363
IV.	<i>Different degrees and sorts of public subjection</i>	367



## CONTENTS.

V.	<i>Civil subjection of the parts and of the whole</i>	369
VI.	<i>What sort of subjection implied in the notion of a province</i>	373
VII.	<i>Civil liberty what</i>	374
VIII.	<i>Civil liberty of the parts and of the whole</i>	377
IX.	<i>Slaves why incapable of being members of a civil society</i>	388
X.	<i>Where subjection ceases right of resistance begins</i>	391
XI.	<i>Relation of governour and subject is a limited one</i>	395
XII.	<i>Resistance to the supreme power how to be understood</i>	397
XIII.	<i>Right of resistance does not imply supreme civil power in the people</i>	398
XIV.	<i>Opinion of Grotius explained</i>	401
XV.	<i>Civil judge not necessary to fix the point where right of resistance begins</i>	435
XVI.	<i>Treason and Rebellion how guarded against notwithstanding right of resistance</i>	442

## CHAP. IX.

### Of the law of nations.

I.	<i>How far the law of nations is a positive law</i>	444
II.	<i>Nations are capable of an obligation by compact</i>	448
III.	<i>In what sense prescription is a right of the law of nations</i>	448
IV.	<i>No evidence of a positive law of nations to be collected from usage</i>	451
V.	<i>Law of nations may be found by reason or by testimony</i>	452
VI.	<i>Effects of the right of territory</i>	455
VII.	<i>Questions about extent of territory belong to the law of nations</i>	460
VIII.	<i>No right of territory in things, that do not admit of property</i>	465
IX.	<i>Different sorts of war</i>	475
X.	<i>Solemn war what, and why called just war</i>	485
XI.	<i>Justifying causes of war</i>	489
XII.	<i>A nation may be accountable for the act of one of its members</i>	492
XIII.	<i>Members of a nation accountable for injuries done by it</i>	507
XIV.	<i>One nation may lawfully assist another in war</i>	512

# CONTENTS.

XV.	<i>What is lawful in war</i>	-	515
XVI.	<i>Property how acquired in war</i>	-	533
XVII.	<i>What prevents prisoners of war from being slaves</i>	-	546
XVIII.	<i>Effects of a declaration of war</i>	-	549
XIX.	<i>Law of nations in respect of states, that are neutral in a war</i>	-	553
XX.	<i>Privileges of ambassadours how far natural</i>		571
XXI.	<i>Public compacts are either treaties or sponsions</i>		581
XXII.	<i>Compacts between nations at peace or nations at war</i>	-	588
XXIII.	<i>Equal and unequal compacts of nations</i>		594
XXIV.	<i>Compacts of the same matter with the law of nations, or of different matter</i>		596

## CHAP. X.

Of the changes that are made in states and in their civil constitutions.

I.	<i>Three ways in which civil constitutions are liable to be changed</i>	-	598
II.	<i>Usage may change a civil constitution</i>		599
III.	<i>Civil constitutions may be changed by express consent</i>		600
IV.	<i>Unjust force does not change a civil constitution in right</i>	-	601
V.	<i>Constitutions may be changed upon failure of supreme governours</i>	-	601
VI.	<i>Abdication may occasion a change in civil constitution</i>		602
VII.	<i>Patrimonial kingdoms are not naturally divisible</i>		604
VIII.	<i>Rules of simply hereditary succession</i>		610
IX.	<i>Lineally hereditary succession what</i>		614
X.	<i>Effect of abdication in lineally hereditary succession</i>		626
XI.	<i>Change of constitution upon breach of compact</i>		628
XII.	<i>Sameness of a state in what it consists</i>		634
XIII.	<i>Several ways, in which a state may cease</i>		635
XIV.	<i>Change of constitution does not change a state</i>		637
XV.	<i>Some sorts of changes in a state do not destroy it</i>		638
XVI.	<i>Variable qualities of a state</i>	-	640
XVII.	<i>Conquest in an unjust war produces no effects of right</i>	-	642
XVIII.	<i>What effects may be occasioned by conquest in a just war</i>	-	643



# INSTITUTES OF NATURAL LAW.

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## BOOK II.

### CHAPTER I.

Of societies in general, where all the members  
are equal.

- I. *A society what.* II. *What acts of a society bind its members.* III. *Upon an equality of votes nothing is done.* IV. *Natural majority what, and how to be reckoned.* V. *Absent members have a right to vote by proxy.*

I. **A** Society is a number of men united together by mutual consent in order to deliberate, determine and act jointly for some common purpose. A society what.

II. In every <sup>a</sup> society, where all the members are equal, that is, where one has no more authority than another, whatever is determined by the whole, or by the greater part is binding upon each of the members. What acts of a society bind its members.

There can be no question, whether the act of the whole is binding upon each of the members: because each of the members is naturally bound by his own act; and the act of the whole is only the joint act of each individual member. The chief doubt is, whether the majority can naturally by any joint act of theirs

<sup>a</sup> Grot. L. II. C. V. § XVII.

bind, not only themselves, but the whole society, even those, who are in the minority, and dissent from such act. This seems at first sight to be inconsistent with a well-known rule, that, as all men are naturally equal, no person can be obliged by the act of another without his own consent. But it is to be remembered, that when a man joins himself to a society, which is formed or instituted for the sake of carrying on some certain purpose, he either expressly consents, or must, by thus joining himself to such society, be understood tacitly to consent, that this purpose shall be carried on. He obliges himself therefore by his consent, either express or tacit, to whatever is necessary for carrying on this purpose in such a manner, as is consistent with reason and equity. Now there are but three ways, in which a number of persons can do business jointly: it must be managed, either according to the sentiments of the whole body, or according to those of the greater part, or according to those of the lesser part. In all matters of a doubtful nature, or of an uncertain event; especially where the number of persons concerned is very great; it is next to impossible for all of them to agree in the same sentiments. The purposes therefore, for which a society is formed, could not be carried on, if nothing less than the full agreement of all the members was sufficient to determine what was to be done, so as to bind each of them to concur in the same measure. But each member, when he joined himself to the society, consented, that this purpose should be carried on, and consequently consented to be bound in some reasonable and equitable manner; though the whole society should not happen to agree. This then being the case; the next question will be, whether it is more reasonable and more equitable, that the minority should be bound by the act of the majority, or the contrary? The answer to this



question is obvious. It is plainly most consistent with reason, that the sentiments of the majority should prevail and conclude the whole : because it is not so likely, that a greater number of men should be mistaken, when they concur in their judgment, as that a smaller number should be mistaken. And this is likewise most consistent with equity : because, in general, the greater number have a proportionably greater interest, that the purposes of the society should succeed well, and have more at stake, if those purposes should miscarry or be disappointed. This then being the most reasonable and the most equitable way for a number of men to do business jointly, when they are not all agreed upon the same measures ; and each member of the society having originally consented, that the purposes, for which it was formed, should be carried on in the most reasonable and the most equitable manner ; it follows that each member has consented to have the business of the society done according to the opinion of the majority ; where there is not an unanimous agreement of the whole.

From hence it appears, that, although no person can naturally be obliged but by his own consent, yet each person, who votes with the minority, is obliged by the act of the majority. He does not indeed give an explicit consent to such act at the time of voting : but there was a prior consent, from whence this obligation arises : when he became a member of the society, he consented, either expressly or tacitly, that he would in all instances conform himself to what should be the sense of the greater part of that society, to which he joins himself, so as to become a member of it.

III.<sup>b</sup> Where the members of a society are equally divided in their opinions upon any point ; there is no more weight of reason or of equity on one side than there is

Upon an equality of votes nothing is done.

<sup>b</sup> Grot. *ibid.* § XVIII.

on the other. No business therefore can be done : and consequently all things must, upon such an equality of votes, continue in the same state, that they were in before, without having any change made in them. For this reason, says Grotius, where judges are equally divided in their opinions, as to acquitting or condemning a criminal, such criminal is acquitted. And in like manner, where they are equally divided upon a question of property, the possessor keeps the thing in dispute.

But after he has thus assigned the true principle for these determinations, he goes on to observe, from Seneca, that, when one judge acquits and another condemns, the milder or more favourable opinion prevails. It is true in fact, that where the judges are thus equally divided upon the question, whether a person accused of a crime is guilty of it or not, the milder opinion does prevail. But this is merely accidental. The natural reason, why it prevails, is, not because it is the milder opinion, but because nothing is done. A person accused of a crime is not properly a criminal, till the crime is proved upon him in the opinion of his judges. Unless this is done upon his trial, he is deemed innocent, and is of course acquitted ; there being no middle condition, after trial, between being criminal and being innocent, between being acquitted and being condemned. If therefore, where the judges are equally divided in their opinion, nothing is done ; the necessary consequence is, that the person accused is acquitted : because he has been tried, and is not, in the opinion of his judges, proved to be guilty.

In like manner in a question of property, the possessor naturally keeps the thing in dispute, if the judges are equally divided ; not because it is the milder opinion ; but because nothing is done, and things continue in the same state, that they were in before the matter was



litigated. As the possessor therefore had the thing before so he keeps it afterwards ; an equality of voices not having such a weight against him, as to disturb his possession.

The fact indeed, which Grotius alledges, as the ground of this determination, might in many instances be questioned ; I mean it might be questioned, whether the continuance of possession is the milder opinion. But allowing it to be so ; this is not the principle, which decides in the possessors favour. If this was the leading principle, then in all cases, where there is an equality of voices, the more favourable opinion would take place, as well as in these two cases, which Grotius mentions. Amongst other cases, which might be produced, where it is otherwise, we have one in our own university. If a person petitions the senate for a degree, and the house is equally divided, his petition is rejected. This is certainly a determination on the less favourable side, and proceeds upon the other principle of doing nothing, where there is an equality of votes. He had no degree when he petitioned ; and as an equality of votes does nothing, he continues in the same state : such an equality, not being sufficient to produce any change, is not sufficient to give him a degree.

But though naturally the business of a society must stop, where the society is equally divided in opinion ; yet by mutual agreement this case may be provided for several ways. Some one member of the society either by express agreement, or by custom, which is a tacit agreement, may have a casting voice. Or the business, when, for want of a majority, it cannot be done by the whole society, may by positive institution devolve to some particular members of it : and where such institution gives these select members this power, their act, or, if it is so appointed, the act of the majority of them, becomes binding upon the whole : because each person, when he

consents to be a member of the society, is understood to agree to all the rules or institutions of it. In some lesser societies a farther provision is sometimes made: when a majority cannot be procured within the society, the business devolves to some one or more persons, who are not members of it. And where such provision has been properly established, the determination of such person or persons is binding upon the society; not because such a provision is naturally incidental to a society; but because, when it has been made and established as a standing rule of the society, all, who become members of such society, if they do not consent to it expressly, are understood by the act of making themselves members to consent to it tacitly.

Natural  
majority  
what and  
how to be  
reckoned.

IV.<sup>e</sup> From what has been already said the reader will easily understand, that the natural majority in a society, where no agreement has been made to the contrary, is a major part of the whole. A society may be divided into three or more parts of as many different opinions: and though there may be a greater number of one opinion, than of either of the other two; yet unless that greater number is a majority of the whole society, it is not such a majority, as will naturally, or without some particular agreement conclude the whole. If the members, who are of the other two opinions, when they are taken together, would make a majority of the whole society, neither the equity nor the reason is with the third party. The equity is not with them; because this third party has not a greater interest at stake: and the reason is not with them; because this party is not more likely to judge rightly, than the other two, which differ from it. But as this may be urged equally against any one of the three parties; in such circum-

<sup>e</sup> Grot. *ibid.*, §XIX.



stances all business must stop ; unless some method has been contrived and particularly settled for carrying it on. Some of the methods already mentioned, by which the business of a society may be carried on, when there is an equality of votes, may be made use of here. Or it may have been particularly provided, either by express consent or by custom, that whatever is agreed upon by the greater number, whether such greater number is a majority of the whole or not, shall be conclusive. And though it is not naturally incidental to a society to be determined by such a majority as this ; yet an express agreement for this purpose, or long custom, which is a tacit agreement, are natural means of obliging the members to be concluded by such a majority.

It may happen, that, when a society is divided upon any question into three or more parties, though none of the parties taken separately make a majority of the whole society, so as to determine upon the whole question, yet two of the parties may so far agree, upon part of the question, as to make a majority for determining that part. And if these two parties are reckoned together for this purpose ; then the remaining part of the question is to be determined by a second vote or scrutiny. Thus, if a society of judges are divided into three parties, one of which condemns a criminal to death, another condemns him to banishment, and a third acquits him ; the two former parties agree, that he is guilty, and may be reckoned together to make a majority against those, who acquit him. This part of the question then is determined conclusively : the third party is over-ruled by the majority, which have agreed, that he is to be punished, and is therefore obliged upon a farther scrutiny to join itself to one of the other two parties, so as to make a majority of the whole for settling what his punishment shall be. Suppose, one party of the judges to

condemn the criminal in a fine of ten pounds, another party to condemn him in a fine of five pounds, and a third party to acquit him : those, who condemn him in a fine of ten pounds, agree with the second party, that he is to be fined: but though the lesser fine of five pounds is included in the greater, yet this is no reason, why the fine should be settled at five pounds. The two parties agree or say the same thing, thus far, that he is to be fined : but then they do not agree entirely : they, who set the fine at ten pounds, may be understood to say, that he shall be fined five pounds, but this is not all, that they say ; they say this and more. We cannot therefore, in order to procure a majority of the whole society, follow the opinion of Grotius, as Gronovius has explained it, and settle the fine at five pounds, but must, as in the former instance proceed to a second scrutiny. The majority have determined, that the criminal shall be fined ; they therefore, who were for acquitting him, are concluded thus far, and must upon the other part of the question ; how much the fine shall be ? agree with one or the other of the two parties.

These difficulties may however in most instances be avoided, if care is taken, in stating the question, to divide it originally into all its parts, and then to put each part to the vote separately. Thus in the first instance, that we have been mentioning, if instead of voting from the beginning, what in general was to be determined concerning the person accused, the judges begin with voting, whether he is guilty or not ; they can only divide themselves into two parties. If this question is determined in the affirmative, they may next vote, whether he is to be punished capitally or not ; and here again there can be but two parties. They may proceed in the same manner through the several sorts of punishment, and may thus without much difficulty come to a clear decision.



<sup>d</sup>The foundation of a society may be some real possession, in which the several members of the society have unequal shares. Thus a joint stock of money may belong to several proprietors; and some of these proprietors may have ten times, some four times, some three times as great a share in the capital, as others. In such societies, Grotius is of opinion, that the weight of each persons vote, in regard to the management of the joint stock, should be estimated in proportion to his share in that stock; or that, if he, who has one share, has one vote upon any question, he, who has two shares, should have two votes, and he, who has ten shares, should have ten votes. The equity of the case seems to be on this side; as it is equitable to allow each person a weight, in determining upon any question, proportionable to the interest, which he has, that the whole stock should be rightly managed. But the reason of the thing is on the other side: since there is no more likelihood, that a man should judge rightly about the management of such stock, because he has ten shares in it, than there would have been, if he had been possessed of no more than one share. We cannot therefore from the nature of such societies determine either one way or the other: and this uncertainty makes it necessary, that the point should be settled by particular agreement. In fact we find, that some societies of this sort have settled this point one way, and that others of the same sort have settled it the other way.

V. <sup>e</sup>When a society meets to do business, the absent members of it have a natural right to vote by proxy, that is, to appoint agents, who shall vote in their stead: because what a man does by another is naturally as much his own act, as if he had done it in his own person. But when we speak of the right of voting by

Absent  
members  
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right to  
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proxy.

<sup>d</sup> Grot. *ibid.* § XXII.

<sup>e</sup> Grot. *ibid.* § XX.

proxy as a natural one, we must not be understood to mean, that it is an unalienable one, so that the members of a society cannot by agreement bind themselves either to vote in person or not to vote at all: we only mean, that, where no such agreement has been made either expressly or by custom, it is not incidental to society, that no member should have a right to act by another: every one has in this instance, as in all others, a right of appointing a proxy to act for him, unless he has consented to part with that right.

A society may indeed be so formed, that each member may be represented in it, though he has no particular proxy. To such societies, as these, it is naturally incidental, that the absent members of them should have no right of appointing any particular proxies: because they are represented without having any. Thus if a society, which is too large for all the members of it conveniently to meet together for doing business, chuses a select number or smaller society out of the whole, and delegates a power to this smaller society to do business for them; each member of this committee or smaller society, being likewise a member of the whole, has had his vote already in the choice of such committee, and consequently is represented in it. If therefore he should at any time be absent, when the rest meet, he has no right of voting by any particular proxy, of his own immediate appointment; because by this means he would be twice represented; once by the committee, which he had a share in chusing, and once by such proxy so appointed.

But in all societies, where there is no right of appointing proxies, and even in those, which allow this right, if any member is absent without appointing his proxy; such members, as are present, conclude the whole: because those, who are absent, are, by their not attending either in person or by proxy, understood to devolve their power of voting upon those, who do attend.



## C H A P. II.

## Of civil society, its nature and origin.

*I. Civil society what. II. The motives, which lead men to form civil societies. III. All mankind are not one civil society. IV. The manner of forming civil societies. V. Occasions of forming civil societies. VI. How men become members of civil societies. VII. Members of a civil society not to leave it without consent of the public. VIII. How far allegiance to a civil society is due from its banished members.*

**I.** A Civil society, or, as we usually call it, a state has <sup>f Civil society what.</sup> already been defined to be a compleat assembly of men of free condition, who are united together for the purposes of maintaining their rights, and of advancing a common good. These two purposes, which civil society has in view, point out to us the mutual claims of such society and of its several members.

Each individual, who associates himself with others, so as to form with them one civil society or body politic, does it with a view of obtaining their assistance in the maintenance and support of his rights; that is, he proposes to himself the advantage of being protected against such injuries, as he might have been exposed to, if he had continued in a state of nature. On the other hand, the body politic, to which he joins himself, that is, the other individuals, with which he associates, expect in return, that, as he is protected by them, he shall agree with them in whatever is necessary or conducive to their common benefit.

Now as these are the known purposes, which the body and each of its members have respectively in view,

<sup>f</sup> See B. I. C. I. § XI.

in associating with one another; the very act of associating, though there should be no express stipulation between them, implies, that the society, considered as a body, agrees to the terms, upon which each individual joins himself to it; and that each individual agrees to the terms, upon which the society admits him as a member. And thus the society obliges itself to protect its several members; and each member obliges himself to pay allegiance to the society, that is, to conform himself to whatever such society shall judge to be for the common good.

The motives which lead men to form civil societies.

II. Under the notion of protection two things are implied, first the ascertaining our several rights and consequently the several duties that correspond to them, and secondly the use of such force as is necessary to prevent those rights from being violated. The law of nature considers all mankind as one great society, and obliges them in this view not to hurt one another, and mutually to do for one another all such kind offices, as are in their power. And if all mankind were fully informed of the several particulars included in this general rule, and were ready to act accordingly, they would have no inducements to separate themselves into lesser communities, or to form civil societies. But though the general rule of duty may be plain and obvious, yet all men are not able to apply it to particular instances of practice, and even amongst those, who can apply it, few are willing, to act up to it. § The law of nature has indeed provided a remedy against injuries in the equality of nature: any person, who is either in danger of suffering an injury, or has actually suffered one, may make use of force either to defend or to redress himself. But this remedy will frequently be insufficient, when he has

§ B. I. C. XV. and C. XVII. and C. XVIII.



no force but his own to carry his claims into execution, and to support him in the enjoyment of what he has a right to. If those, who unjustly oppose or attack him, are stronger than he is; his right will avail but little against their superior strength. He might indeed defend himself; but he is not able: he might demand reparation of what damages he has sustained; but he is too weak to enforce this demand: he might inflict punishment upon them, who have done wrong and so secure himself for the future; but they are stronger than he is, and refuse to submit to it. However, we are to observe, that not only the person, who has suffered an injury, but those likewise, who have done one, have sometimes occasion for more strength, than they are masters of, to secure what they have a right to. As the sufferer is apt to be too much blinded by passion and byassed by prejudice, to see how far his duty will allow him to go; there is commonly occasion for some less prejudiced understanding than his own, to lead him to what is right, and for some superior strength, to oppose itself to his passions and prevent him from doing what is wrong.

<sup>h</sup> All men may indeed, in the liberty of nature, join their force to support the practice of justice: but then they are not obliged to do so; they are not so far bound to make themselves parties in the quarrel of another, as to give him any right to demand it of them. And even if he could demand their assistance, he would many times have no benefit from it; unless he had strength enough to compel them: and it is only for want of such strength, that he has any occasion for their assistance.

Here then are sufficient motives to engage mankind to enter into civil societies, that every one may, by the

<sup>h</sup> B. I. C. XIX. § IV.

joint understanding of many, be informed of his duty, and that every one may, by the joint force of many, be compelled to practise it. Nor can we well conceive any other motives, that should lead mankind thus to associate, but what may be reduced to one or other of these two heads: because all would be as happy, as they could wish to be, or at least as the condition of human nature would allow them to be; if all were fully informed of their duty, and all were willing and ready to comply with it.

All mankind are not one civil society.

III. The motives, which we have been speaking of, would not engage any man to associate himself with all his species. What he is chiefly concerned in is, that they who live near him, or with whom he has the most frequent intercourse, should have their duty ascertained, and should be held to the performance of it by such a force, as is sufficient to restrain or to correct them. His interest will be secured, as far as he wants to have it secured, provided they, who are most likely to hurt him, or to hinder his benefit, are informed what they ought to do, and what they ought to avoid; and provided he associates himself with such a number, as will have force enough to guard him against the injuries, which he fears, or to redress the injuries, which he has suffered. As good care is taken of his happiness, as he has occasion for, by joining himself to a part of mankind: if they, to whom he is joined are properly informed of their duty, and have strength enough both to enforce the practice of this duty among themselves, and to repel the injuries of all, who are not associated with them, it is of no importance to him to join himself in this manner to any more, and much less to form the same sort of connection with all mankind.

It is necessary, that the number of persons thus uniting themselves should not be very small: because



though others, who are at a distance from them and have but little intercourse with them, are not very likely to injure them at all, or at least have not an opportunity of injuring them frequently; yet since what is not very likely to happen often, may possibly happen sometimes; it is convenient to have such a number united, as will be able, not only to restrain them, who are members of the same society, from doing what is wrong to one another, but to repel likewise the violence of others, who are not associated with them. But in the mean time, the ends which men propose to themselves in forming civil societies, are so far from leading them to associate in this manner with their whole species, that in such a bulky society these ends could not be conveniently and effectually answered. The common understanding of such an extensive body could neither be collected nor made known, so as to guide all the parts of it: and such an unwieldy body would be unable of exert its joint force. There would indeed be no exercise of a common force wanting to repel the external enemies of this vast community; because, by the supposition, all mankind are included in it. But then as the several parts of it have such inconsistent humours, and such different interests; some or other of them would set up for themselves, and would be daily forming lesser bodies with an interest of their own, separate from the interest of the rest. And as the joint force of the whole could not exert itself to repress such parties, after they were formed, those parties would be able to do what they pleased; unless the force of their nearest neighbours was sufficient to repress them. But as this neighbouring force would not always be sufficient for this purpose, the parties so formed would sometimes establish themselves into a separate society. It would therefore not only be useless, as to the ends of engaging in civil society,

to form one of such a vast extent; but even, if such an one was formed, it would be impossible for it to subsist long, without being broken to pieces, and resolved into such smaller bodies, as can be directed by the common understanding or general sense of their respective wholes, and can exert such a joint force, as is necessary, not only to guard themselves from foreign enemies, but to reduce their several constituent parts to obedience, and by this means to keep themselves together.

The manner of forming civil societies.

IV. What has been already shewn, in the former part of this work, concerning the natural rights of mankind considered as individuals, will serve to teach us by what means civil societies must be formed, in order to make them consistent with those natural rights. <sup>i</sup> Every man has naturally a right to think and to act for himself. The law of nature has indeed restrained him from doing what is unjust, and has subjected him to proper checks to prevent him from causelessly hurting others, and to proper punishment, if he does causelessly hurt them: it has obliged him likewise to advance the happiness of mankind, as he has ability and opportunity; but then it leaves him to judge and determine for himself in what instances he can conveniently advance their good, and to chuse for himself the means of doing it. When he becomes a member of a civil society, the public or body politic claims a right of pointing out to him what is just and what is unjust, and of directing him likewise what good he is to do, and in what manner he is to do it. There is no way of making such a claim as this consistent with his natural right of thinking and chusing for himself; unless by his own consent, either express or tacit, he has waved this right, and has voluntarily agreed to be so guided and directed. Every man

<sup>i</sup> B. I. C. X. § III.



has naturally a right to make use of his own force, either for his own defence, when he is in danger of being injured, or to obtain reparation and to inflict punishment, when he has been injured. But the civil society, to which he is joined, claims a right to judge both upon what occasions any force is lawful, and what force is lawful upon these occasions. And as it takes him and all its other members under the protection of the common force, and considers him as a part of the public; it does not allow him to exert his own force, but in concert with the public, and requires him so to exert it, whenever it is wanted. Here again the claim of civil society, upon the individuals, that compose it, cannot be reconciled with the natural rights of mankind, unless each individual has, either by express or tacit, by explicit or implied consent, parted with such rights, and agreed, that, where the public force can defend or redress him, he will never make use of his own, but in such manner, as the public shall direct. Thus the liberty of individuals is abridged in a state of civil society: the community has such a claim upon them in respect both of the rules, which they are to follow, and of the manner in which they are to make use of their force, as the same men, that compose the society, would not have had, either several or jointly, if they had continued unassociated, or had remained in that state of equality, in which all mankind are naturely placed. And as it would be an injury to take any part of their natural liberty from them without their consent; the consequence is, that civil societies could not be formed, consistently with natural justice, by any other means, than by the joint consent, either express or tacit, of those, who compose it.

Each individual, who thus consents to give up a part of his natural liberty, obtains however more than an

equivalent for what he gives up. If he submits to be guided in his duty by the public understanding or general sense of the community, to which he joins himself; those, who are near him, and with whom he has the most frequent intercourse, submit in return to be guided in the same manner. And as by this means he is less likely to transgress the duty, which he owes to others; so he has good reason to expect, that others will be less likely to transgress the duty, which they owe to him; than if both they and he had continued in a state of natural independency. As he parts with his independent right of using his own force according to his own discretion, either to defend or to redress himself, and gives the public a claim upon him to join his force with theirs, who are associated with him, whenever his assistance is wanted; so in return he is assured of the protection of the community, and has the advantage of a stronger force, than his own, to defend and to redress him, when he has a reasonable occasion for it.

As this principle of forming a civil society by the mutual consent of those, who are members of it, is sufficient to reconcile the obligations, which each member is under to the public, with their respective natural rights; so it will likewise shew us, that their associating themselves together in this manner is not contrary to the rights of others, who are not associated with them, and to the obligations, which they are under to the rest of their species. The claim, which the public has upon the liberty of each individual, who is a member of it, arises originally from his own consent. This<sup>k</sup> claim therefore can extend no farther, than such individual had a power of binding himself or of alienating his liberty. Now each individual, who joins himself to any civil society, is under a prior obligation to observe the laws of nature



and to make them the rule of his conduct towards all mankind : and as he has not the liberty of transgressing those laws, he cannot alienate a liberty, which he never had : and consequently he cannot give the society a right to require him to transgress them. When therefore a number of men have united themselves together for the purposes of maintaining their rights, and of promoting their common good ; what they have done in order to obtain these purposes is no injury to the rest of mankind. The individuals, who are thus associated, are still under the same obligations towards all such, as are not associated with them, that they would have been under, if they had still continued in the liberty of nature. Whatever adventitious obligations arise from the civil connection of these individuals with one another, they must be such as are consistent with the duties, which they naturally owe to the rest of mankind, who are not joined to them by any connections of this sort. Those, who are members of the same civil society, acquire new rights and are laid under new obligations in respect of one another. But then, since these rights and these obligations must be consistent with the law of nature, all, who are members of the same civil society, are still bound to observe the law of nature towards the rest of mankind ; their rights and obligations in respect of all such, as are either members of different civil societies, or remain in the liberty of nature, are the same, that they would have been, if no such civil connections had ever been formed.

V. The occasions of forming or beginning distinct civil societies have been various. A number of individuals falling into distress at one and the same time, and hoping by their joint force and mutual assistance to mend their condition, have in many instances been the founders of new civil societies. Thus a multitude of

Occasions  
of forming  
civil  
societies.

the Heneti, who had been driven from Paphlagonia, joined themselves to Antenor, and settling with him on the coast of Italy founded the state of Venice. It may perhaps be denied, that there ever was a time when all mankind lived in a state of nature. But be this as it will: there certainly have been many persons, who at one and the same time have been broken off from societies already established, and have been forced to shift for themselves independently of one another. Individuals in these circumstances are properly in a state of nature, and have no other connections with one another, besides what they make by joint consent; and their common distress is a natural occasion of endeavouring to form such connections, for their mutual relief and support.

But distress has not always been the occasion, which led men to unite together and to form a common or civil interest. They have sometimes been brought together by their birth, that is, by having arisen from the same common parent. I would not be understood to mean, that parental power is the same with kingly power; and that the children of the same parent were under any natural obligation to submit to such parent as their civil governour, after they were grown up. They were subject indeed to his parental authority, whilst they continued in the state of infancy; and this might induce them to place themselves afterwards by their free consent under his civil jurisdiction. But if no such consent had intervened; then as soon as they were grown up, and were able to think and to act for themselves, they were naturally at liberty either to continue in his family, and so to become subject to his power, as the head of this little community, or else to withdraw themselves from it, and to begin other fami-



lies or communities of their own. Their children again; when they came to years of discretion, would enjoy the same liberty; they might either remain with the original ancestor, and so increase the family; or they might separate themselves from this community and set up for themselves. If the children of the same parent, and their descendents after them, choose to remain united together under the direction of the common ancestor; such a number of free men so united by their own consent, in order to secure their respective rights, and to advance their common interest, would form a civil society. I call them free men; notwithstanding the subjection to their common ancestor, which began from their birth, might be continued during the life-time of such ancestor: because when they were at age to judge for themselves, they were free to separate themselves from his family: and if their subjection to him as their civil governour continued, it was the effect of their own act. His authority as a parent ceased, when they attained to the use of their reason: and whatever authority, properly so called, he might have over them afterwards, as parts of his family, it was derived from their chusing to continue in this family, of which he was the head. If any of the immediate or the remoter descendents of this common ancestor found reasons to leave the family; those, who so separated themselves from it, acted as consistently with the law of nature, and consequently had as good a right to do what they did, as the others, who remained in it. For the law of nature, after children are arrived at a proper age, ties them to no other duty in respect of their parents, besides those of gratitude and reverence: and these are duties, which will not confine them to live under the jurisdiction of their parent;

they are duties which imply no such subjection, as will oblige the children to continue in the parents family, and to submit themselves to his civil authority.

The Jewish state arose from such a beginning as this. The descendants of Abraham, in those branches of the family, which were derived from Isaac, and after him from Jacob, continued together; till they were so encreased, as to become a multitude; and till their family-connection ended in a civil union. In the mean time Ishmael and Esau, with their respective descendants, separated themselves from the rest of the family; and each of them founded distinct bodies politic. They became wholly unconnected with the rest of their brethren, and with each other, and had no other connection with their respective parents, besides the ties of filial love and reverence. We have an instance of this filial love in Ishmael, when he joined with his brother Isaac <sup>m</sup> in burying their common parent. And I chuse to take notice of this circumstance, that the reader may not imagine the sons duty of filial reverence to be inconsistent with his civil independency: for it is plain, that Ishmael, notwithstanding this act of filial reverence, had no civil dependence upon his father Abraham: because he was then separated from the family of Abraham, not only by his own choice, but by the act of Abraham himself, and consequently was so entirely free from all proper jurisdiction of his parent, as to have a full right to dispose of himself in what manner he pleased. It is farther observable in this patriarchal family, that a son, by being separated from the family of his parent, not only ceases to be under the jurisdiction of this family with the parent at the head of it, but may even acquire civil jurisdiction over it. Joseph was accidentally separated from the rest of

<sup>l</sup> Gen. C. XVI. XVII. &c.

<sup>m</sup> Gen. XXV. 9.



his brethern, and began a family of his own in Egypt; where he was advanced to civil authority not only over the native Egyptians, but over all strangers, who were permitted to settle in that country; amongst whom we find his father and his brethren. No one can reasonably deny, that in these circumstances he had as good a natural right to found a distinct society, as his father Jacob had. Any positive command of God to keep all the children of Jacob united together is here out of the question. As we are now considering how civil societies may begin, and what may give occasion to the founding of them consistently with natural right; we might be excused from taking notice of whatever is matter of positive institution. However we find, that even in this family, which was kept together by such positive command, the descendants of Joseph were looked upon as parts of a new family, exempt from the patriarchal jurisdiction, till they were recalled into it by "adoption or consent of parties. So little ground is there for concluding, that, because family-connections have in some instances been the occasion of civil union, therefore civil power is naturally derived from parental authority, without the consent of those, who are subject to such civil power.

The reader, if he attends to the history of Abrahams family, will be able to deduce these consequences from it. First, civil societies may frequently begin from family-connections: the children and descendants of the same common stock, having been connected with one another originally, may choose to continue united, and by such a voluntary union, which their original connection led them to, may form a body politic. But then secondly; though every child is born under a natural subjection to his parents; yet he becomes indepen-

dent of them, as he advances in years, and is able to think and to act for himself. He is therefore at liberty either to separate himself from his brethren, to remove himself from under the jurisdiction of his parents, and to begin a family or society of his own, or else to continue with his brethren, to remain under the jurisdiction of his parents, and so to make a part of that community, of which his parents are the head. If the child separates himself from the family of his parents, their authority over him is at an end; nay he may even acquire civil jurisdiction over them. He still owes them indeed the duties of gratitude and esteem; and as the instance of Ishmael already mentioned will serve to teach us, that these duties are consistent with the civil independence of the child, so the behaviour of Joseph towards his father is an evidence, that the duty of filial piety is so far from subjecting the son to any civil jurisdiction of the father, that it is consistent even with the sons civil jurisdiction over the father. If the child remains in the family of the parent: then indeed the parents authority over him continues after he is come to years of discretion: but it is continued no otherwise, than by the choice and voluntary act of the child: it is his own consent, either express or tacit, which produces civil jurisdiction, when paternal authority ends.

If any one doubts, whether civil society arose at first from mutual consent, and his doubts proceed from a notion, that mankind were never actually in a state of equality, because all men were born in a natural subjection to their parents; it will now be easy to clear up this difficulty. The subjection of a child to the authority of his parents continues during his infancy: but after he is come to years of discretion, he is then, as to any jurisdiction or authority, properly so called, equal to his parents, and is therefore, in respect



of them, so far in a state of nature, as to be at liberty either to join with them in the same society, or to begin a society of his own. Suppose it therefore to be true in fact, that civil society is as ancient as the race of mankind, and that the natural connections of the first family gave occasion to the first civil society; yet this supposition will be no objection to what has been said concerning the means, by which civil societies are formed. These family-connections might give occasion to civil union; but such union could never be formed consistently with that natural equality and independency, to which all men are born, without some express or tacit consent of the individuals so united. Notwithstanding the first man's parental authority over his children, he would have had no natural right to keep them in subjection, after they became capable of thinking and acting for themselves; if they had not agreed to submit to him as their civil governour.

It is probable indeed, that the first civil societies were nothing else but so many distinct families with their respective parent at the head of each of them. But then we cannot well imagine, that in these first rudiments of civil society, or these first attempts to form bodies politic, every thing was immediately as well regulated, as we find it at present. There is not the least appearance of reason for believing, that the ties, by which the several parts of these bodies were united to one another, were the same then, that we find them to be now. We must on the one hand be but little acquainted with the history of mankind, or of the beginning of nations; if we can persuade ourselves, either that the first civil society was formed by a regular meeting of a number of men, who had before lived in a state of nature, and then agreed to unite into a body politic, which arose at once from such agreement, com-

plete in all its parts, as well methodized as the ends of forming such bodies require, as the light of reason could suggest, or the law of nature admit. On the other hand, if we are aware, that the first rudiments of civil society were laid amongst the children of the same parent and amongst the families descended from the same common stock; we must have made but few observations upon the gradual improvements in all other human inventions, if we can persuade ourselves, that societies were from the beginning kept together by the same ties, which keep them together at present. One would rather think, that a common affection for their parent, a deference to his judgment, a sense of his regard for them, and the inconvenience of leaving him, were the bands, which at first kept his descendants together. As these bands would be broken by his death, the several families, which were derived from him, would then be at liberty to separate from one another. Thus the several sons of the same parent, who continued in a sort of temporary society, whilst he lived, would be in a state of nature, after his death, and might either by a subsequent consent continue united under such a form of government, as they could agree upon, or else might each of them assert his own independency, and begin a society from that branch of the family, of which he himself was the head.

We meet with something like this in the history of Jacob and Esau. "Though Esau complained of having been defrauded by his brother; yet, whilst they continued in the family of Isaac, he considered himself as under the jurisdiction of their common parent, and did not propose immediately to punish the act, which he complained of, but resolved, that, after Isaac's death, he would assert his own independency and would kill his brother Jacob. His <sup>P</sup> convenience however led

him afterwards to separate from his father, and to set up for himself, before this event happened. By this means he became independent of the little society, to which he formerly belonged, and was advanced to be the head of such another society of his own forming. Jacob was aware of this; and knowing, that his brother Esau was no longer under the jurisdiction of their common parent, he did not think himself safe under Isaac's protection, but sought for other means of security, and endeavoured to purchase his friendship or at least to appease the anger of Esau by a present.

It is not necessary to suppose, that all civil societies were encreased, till they became as large, as we now find them, by the constant addition of fresh descendants from the same original parent. As the sons of one common parent, and the families derived from those sons, who had consented to remain united together under the jurisdiction of such parent, as long as he lived, were at liberty after his death either to continue in a like union, or to separate from one another: so the sons of different families, and their descendants with them, in consequence of such a liberty as this, might join with one another and form larger bodies, which did not come originally from the same common stock. Such unions may frequently have been occasioned by the want of a settlement, or by the fear of unjust violence. The fear even of just punishment has undoubtedly sometimes encreased the multitude in a society thus joined together: and Rome itself would have begun from smaller numbers than it did, if its founder had not opened an asylum to screen criminals from justice. Nay there is some reason to believe, that the first society which we read of, owed its original to such an occasion as this. <sup>9</sup> The first city, that history makes mention of, was built by Cain. And if Cain does

<sup>9</sup> Gen. IV. 17. 2.



not shew what motive led him to this undertaking, when he declares his apprehension, that every one, who found him, would kill him; yet we may learn it with some degree of certainty from what Lamech is recorded to have said to his two wives. He did not chuse to be shut up with his brethren, but was desirous to live at large like the rest of mankind: and to encourage his wives not to fear, that the crime of their ancestor would be punished upon them, he clears himself from the guilt of it, and assures them, that there was no danger in leaving their present way of life, and in trusting themselves abroad. This will be the most obvious meaning of what he says to Adah and Zillah, if we render the words, as they may be rendered—Have I slain a man to my wounding, and a young man to my hurt? If Cain shall be avenged seven-fold, truly Lamech seventy and seven-fold.

How  
men be-  
come  
members  
of civil  
societies.

VI. The condition of mankind is at present something different from what it was formerly, when civil societies first began to establish themselves. Such societies are now established in almost all parts of the world, that are inhabited at all: they are no longer in their first rudiments, as they were whilst separate families were making attempts to settle themselves, and to collect a force sufficient to repel injuries, but are founded upon steady principles, and unite their several members together by firm and lasting ties. And yet even in the present circumstances of mankind, numberless individuals have an opportunity of setting themselves free from these ties in such a manner, as to be at liberty either to found new civil societies, or to unite themselves to such new societies, as others have begun.

It will be necessary, for the better understanding this matter, to consider by what means men naturally

become members of any particular nation or civil society; and by what means, after they are so become members they may be at liberty to separate themselves from it again. Civil societies in general are willing to consider persons, who are born amongst them, as members of those societies where they are born. It is plain, that they are considered in this light, because if they were looked upon as aliens, till they have been formally admitted to be members, they would, like all other aliens, be incapable of inheriting immoveable goods. But then this is matter of favour in the society: and persons so born seem to be naturally at liberty either to make use of this favour or to refuse it. There does not appear to be any natural reason why a child, though he is born of parents, who belong to any particular nation or civil society, and is born likewise within the territories of that nation, should be obliged, after he is come to years of discretion, to continue in it. Positive institutions may indeed have ordered it otherwise: but he appears to be naturally at liberty either to make himself a member of that society, if it will receive him, or to join himself to any other, or to begin a new one in any part of the world not yet inhabited. He may indeed part with this liberty, after he is capable of thinking and of acting for himself, either by express or by tacit consent. If any express stipulations for that purpose pass between him and the society, in which he was born, he makes himself a member of it, and is no more at liberty, after such stipulations, to leave this society, than he is to depart from any other contract, by which he has bound himself. But without any formal or express stipulations, he may unite himself effectually to the society, in which he is born, by tacit consent. After he is arrived at maturity of judgment, if he continues to make use

of the protection of that society, and to pay it such allegiance, as it requires of its members; his conduct must necessarily be understood as an evidence on his part, that he is willing or consents to be a member of it, and on the part of the society, that it consents to receive him. Amongst other instances of tacit consent we may reckon his taking and holding such immovable goods, as are in the jurisdiction or general property of the society. As <sup>t</sup>aliens cannot naturally take and hold such goods; as it is plain, that the society by allowing a native to take and hold them considers or however is willing to consider, a native as a member. And whoever makes use of this favour declares by so doing that he is willing or consents, to be considered in the same light, in which the society considered him. And it may be worth the while to observe, that though he should afterwards relinquish his goods, or dispose of them by sale or by gift, he does not cease to owe allegiance to the society: because the jurisdiction of the society over him did not arise merely from the possession of such goods, but from his consent to be a member of it, of which consent his so taking and holding these goods was an evidence.

The only natural difference between a native and a foreigner, in respect of their becoming members of any particular civil society, is, that the native was certainly never united to any other society; whereas the foreigner, may possibly have been united to some other, before he came to settle within the territories of this. The effect of this doubt, concerning the possibility of the foreigners being a member of some other civil society, is, that he cannot become a member of the nation, in whose territories he settles, without some express stipulations, by which he engages his allegiance to this na-

<sup>t</sup> B. I. C. VI. § VI.



tion, and is formally received by it, If he continues there any time before he makes these express stipulations, and before he is formally received as a member; he is obliged to behave himself peaceably and to submit to the laws of the country; because the society would not suffer him to stay within its territories upon any other terms. This peaceable behaviour therefore is no evidence on his part, that he owes no allegiance any where else: and the society by allowing him to stay within its territories, before this point is cleared up, cannot be understood tacitly to receive him as a member. In the mean time he cannot unite himself to the society by taking and holding such land, as is under its jurisdiction: because as long as he is considered as an alien, that is, till he is formally admitted into the society, he is naturally incapable of taking and holding such land. These principles however are not applicable to foreigners, who have been brought by their parents into the territories of any nation, and have settled there, whilst they were in their infancy. For at that time of life, they could naturally owe no allegiance elsewhere. And consequently, if any distinction is made between such foreigners and natives, it must be derived merely from positive institution.

But notwithstanding the close ties, by which, in the present constitution of civil societies, men are generally understood to be connected with those particular societies, of which they are members; it is possible for them to recover a natural right of founding and establishing new societies independent of that, to which they formerly belonged. Where the territories of a nation are small, or where the inhabitants even of a large territory become very numerous, especially if they have not the skill or the opportunity of supplying themselves with necessaries by husbandry, or by trade and by manufac-

tures; it will be for the convenience of all parties, that companies of adventurers should be sent out to seek their fortune. Sometimes a powerful faction in a state think it for their interest to drive out their weaker antagonists. Sometimes a lawless tyranny, usurped over the religious or civil rights of the subjects, leaves them only the alternative either of submitting to oppression and cruelty, or of freeing themselves by a voluntary exile. Sometimes by war or other calamities a civil society, which was formerly established, may be broken in pieces. In any of these cases, and in many others of the like sort, which the readers own imagination, or his acquaintance with the history of mankind may suggest to him, there are individuals enough restored to the liberty or equality of nature to begin new societies, in any part of the world, where they can gain a settlement, and under any form of government, that is agreeable to themselves. And as individuals, when they are in these circumstances, are at liberty to found a civil society of their own, if they have numbers sufficient for such a purpose; so are they at liberty to join themselves to any civil society, which is already established, and is willing to receive them.

Members  
of civil so-  
ciety not  
to leave it  
without  
consent of  
the public.

VII. <sup>r</sup> Grotius is inclined to think, that individuals, after they are become members of any particular civil society, are at liberty to withdraw themselves from it at any time, even without having first obtained the consent of that society. The principal or indeed the only reason, which he offers in support of this opinion, is, that though such a liberty might be inconvenient to the society in respect of the members, which it loses; yet this inconvenience may be balanced by the general consideration, that, if this is the case in all civil societies whatsoever, each in its turn would be as likely to gain

new members from others, as to lose old members of its own. But the determination of this question does not depend upon prudential reasons, which can only give occasion to positive institutions; but upon such reasons, as are drawn from those mutual ties, between the body politic and its several members, which necessarily result from the nature of civil society.

Grotius himself makes such concessions upon this head, as will be sufficient to overturn his own opinion. In the first place he allows, that it is inconsistent with the nature of civil society for its members to withdraw themselves in great numbers at one and the same time. For we cannot suppose civil society to form itself upon such principles, as naturally tend to its own destruction: and consequently we cannot suppose the nature of it to be such, as will allow the members to withdraw themselves in great numbers at once; because such a liberty as this tends to destroy it. From this concession we may reason in the following manner. If any one individual is at liberty to withdraw himself at any time from the civil society, of which he is a member, without having first obtained the consent of that society; any other individual has the same liberty. If any two individuals may thus leave the society, whenever they please, any other two may leave it in like manner. And what is naturally lawful for any four individuals, must upon the same principles be equally lawful for any four hundred, or any four thousand, or any other number of them. We cannot therefore maintain, that a single member of a civil society may leave the society, to which he belongs, whenever he pleases; unless we will maintain farther that any number of members may leave it, at any time. But our author allows, that it is inconsistent with the nature of civil society for great numbers thus to withdraw themselves; and consequently he ought upon his



own principles to allow, that it is equally inconsistent. with the nature of civil society for any single member to leave it, till he has first obtained the consent of the society.

Grotius allows farther, that where the society has any particular interest in keeping all its members together; suppose for instance, that the public is in debt, so that the burden of paying the debt will be less felt, in proportion as there are more persons to bear a part of it; or suppose, that the state is engaged in a war, or any other undertaking, the success of which depends upon its numbers; no person can leave the society consistently with his obligations to it; unless he has taken care to satisfy the interest, which it has in his continuing united to it. Now if this is a true principle, if no member of a civil society is at liberty to withdraw himself from it, where the society has a particular interest in his not withdrawing himself; the consequence is, that no member can leave the society, till he has first obtained the consent of the public: unless we maintain, that each member has naturally a right to judge and determine between himself and the public, how far it is interested in his staying or withdrawing himself.

If each individual was at liberty to leave the state, to which he belongs, whenever he pleases; civil society would be nothing but a rope of sand; it would be impossible for a common good to be effectually promoted, or for a common mischief to be effectually guarded against. Every member of the society would be at liberty either to continue in it, and endeavour to advance the general interest, or to leave it, in order to advance a separate interest of his own. And in times of public distress, whoever could shift for himself would be at liberty to do so, though he left the other members of the society to perish for want of his assistance. But the great end of forming civil societies is to promote a com-

mon good, and to guard against a common mischief. Certainly therefore the nature of civil society can never allow such a liberty as this to its members : because it is inconsistent with the end, which a civil society proposes to itself. Each particular member indeed proposes to advance his own interest, to obtain his own benefit, and to guard himself against such dangers, as he would be exposed to in a state of nature. But this design of any individual, though it is the motive, which engaged him to join himself to the society, is not the measure of the obligation, which he is under towards it. The other individuals, who are associated with him, as each of them had the same view for himself, that he had, would not have joined with him for these purposes of promoting his benefit, and of securing him from violence, unless he would consent to join with them for the like purposes, for the purposes of promoting their benefit, and of securing them from violence. So that if each member is considered in his turn as an individual joining himself to society, and the other members are considered as the society, to which he joins himself ; the ends proposed on each part are their respective benefit and security. And as these are the terms, upon which they associate ; the very act of associating implies, that they agree to these terms, that each individual consents to join in promoting the common interest, and in maintaining the common security of the rest. The end therefore, which each proposes, is a particular good to himself : but he cannot pursue this end by the help of civil society, that is, the society will not receive him as a member, upon any other terms ; but those of consenting, and consequently of obliging himself by such consent, to join with it in promoting a general good. Protection is the end which he proposes ; and as the society by receiving him agrees to this end, it

becomes the measure of the society's obligation towards him. Allegiance is what the society expects in return; and as he by joining himself to it agrees to these terms, they become the measure of his obligation towards the society. But in this mutual obligation thus derived from mutual consent, as in all other contracts, where there is no failure in performing the conditions stipulated on one part, it would be unjust not to perform the conditions stipulated on the other part; unless the parties contracting have released one another by a like consent: as long as the society grants the protection, which it owes to the individual, he cannot justly withdraw the allegiance, which he owes to the society; unless he has the consent of the society for so doing.

There is however no reason for maintaining in the mean time, that every person, who is a member of any civil society, must necessarily continue a member of the same society, unless the public expressly consents to his removal from it. Where an individual of little or no importance to the state removes, and is neither stopped at first nor reclaimed afterwards; this may be looked upon as a tacit consent; the public may be presumed to agree to what it does not hinder. And thus far the opinion of Grotius may be admitted to be true; that though a single member of no importance may thus remove in times of peace and security without the express leave of the state; yet no individual of great importance, nor a great number of individuals, who are made of importance by their numbers, nor any individual in times of public distress, when the situation of affairs makes every one of importance, can presume upon the consent of the state, but in order to justify their removal they ought to have its express consent: not because an inconsiderable person in times of peace and security has any more right to withdraw from a society without its consent,



than he would have in times of public danger, or than an important person, or a number of persons of any fort would have at any time; but because the consent of the society, though it is not expressly granted, may be more reasonably presumed in one case, than it can be in the other.

This obligation upon every individual, who is a member of any civil society, not to leave it without either the express or the tacit consent of the public, is no exception to an instance, just now mentioned, of persons freeing themselves from lawless tyranny and oppression by a voluntary exile: since the withdrawing protection on the part of the society, and much more such lawless tyranny and oppression, as is not only inconsistent with the notion of protection, but is directly contrary to it, must necessarily be looked upon as a discharge from allegiance on the part of its members. For in this contract between the members and the body, as in all other contracts of a like sort, when one of the parties refuse to discharge their part of the obligation, this is naturally a release to the other party.

VIII. A civil society, says \* Grotius has no claim of allegiance upon its banished members. And certainly this must be true in general: because the obligations, of protection on the part of the society, and of allegiance on the part of its members, being mutual; whenever the society judges the crimes of any one of its members to be such as will discharge it from affording him protection any longer, and will justify it in forcing him to leave it, the natural consequence of its withdrawing protection is, that such member will be discharged from all claims of allegiance, which the society had upon him. We might as reasonably maintain on the one hand, that the public owes protection to the

How far  
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individual, when he has withdrawn his allegiance, as on the other hand, that the individual owes allegiance to the public, when it has withdrawn its protection. All that can be said to make these two cases appear different is, that if the individual is banished for any crimes committed by him, the public has a just cause for putting him out of its protection; whereas, if he has left the society without its consent, he has not justly withdrawn his allegiance. But this difference is not at all material to the point in question. If indeed we maintained, that where protection is withdrawn by the society, allegiance may be withdrawn by the member in the way of reprisal; it might be something to the purpose to urge, that in the case of banishment the state has a just cause for putting the member out of its protection: because then it would follow, that where the society has done no wrong to the individual by banishing him, he could not justly make the reprisal of withdrawing his allegiance. But this is not the way, in which his obligation to allegiance ceases: it ceases of natural consequence: his right to protection and his obligation to allegiance correspond to one another; and when he loses the right, whether justly or unjustly, the correspondent obligation is at end. However, the opinion of Grotius upon this head, though it is true in general, ought to be so explained as to admit of its natural limitations. A member of civil society is commonly said to be banished, when he is compelled to leave that part of the societies territories, in which he was settled and had made all his connections before, and to remove to some distant and perhaps inconvenient part of them. Such a removal as this, though we usually call it banishment, is not properly a banishment from the society, but only from his own habitation: he still continues within the territories, and consequently is still subject to the civil

jurisdiction of the society. So likewise we call the temporary removal of a man from under the protection of that society, of which he is a member, by the name of banishment. He is said to be banished, if he is compelled to leave the territories for seven or for ten years. In the mean time the protection of the society is suspended, and of consequence his allegiance must be suspended with it. But then at the expiration of the time, his own state will have the same claim of subjection upon him, that it would have had if he had never been banished: because as such a banishment is not a final excision of him; the nature of it shews, that the state intended to receive him under its protection again, and to reclaim his allegiance. But where the banishment is not limited to any particular time: or where it appears from the beginning to be a final excision of the member; the regard, which he may shew to the authority of such society, after he has left it, is merely voluntary; the hopes of being recalled may lead him, but the nature of civil society will never oblige him, to pay it.



## CHAPTER III.

## Of civil Power.

I. *Civil power is legislative or executive.* II. *Origin of civil power.* III. *Legislative power implies a power of altering and repealing laws.* IV. *Legislative power implies a power of enacting penalties.* V. *Legislative power implies a power of taxing the subjects.* VI. *Executive power is either external or internal or mixed.* VII. *Judicial power, is, internal executive power.* VIII. *External executive power is military power.* IX. *Appointment of magistrates is mixed executive power.* X. *Prerogative what.* XI. *Civil and military power how distinguished.*

Civil  
power is  
legislative  
or execu-  
tive.

I. **I**F we attend to the motives, which lead men to unite into civil societies, they will help to give us some insight into the nature of civil power, that is, to inform us what sort of power naturally arises out of such an union. As men are originally led to unite themselves into distinct civil societies, with a view of having their several rights and duties ascertained by a joint or common understanding, and with a view likewise of forming a joint or common force, so as to act with it for their security ; we cannot suppose them to have united together, without designing at the same time to establish such powers, as would be necessary for obtaining these purposes, which they had in view. The natural consequence therefore of mens forming a civil society is the establishment of a power, in such society, to settle or ascertain, by its joint or common understanding, the several rights and duties of those, who are members of it, and of a power likewise to act with its joint or common force for their defence

and security. The former of these is called the legislative, the latter is called the executive power. No other powers besides these are requisite for obtaining the ends, which mankind propose to themselves in forming civil societies; no other powers therefore besides these are necessary for governing such societies: and consequently civil power, which we have defined to be the power, that governs a civil society, consists of these two branches and of these only.

II. After what has been said, it will be needless to stop here and enquire from whence civil power is derived. For since this power, in both its branches, naturally arises from the establishment of civil society, the same consent or agreement of mankind, by which they form themselves into distinct societies, must necessarily be the principle, from whence civil power is derived.

Origin  
of civil  
power.

III. The legislative power, as it is here defined, implies a power not only of making laws, but of altering and repealing them. As the circumstances either of the state itself or of the several individuals, which compose it, are changed, such claims and such duties, as might once be beneficial, may become useless, burdensome, or even hurtful. If therefore the legislative power could not change the rules, which it prescribes, so as to suit them to the circumstances of the body politic, and of the members of that body; it could not answer the purposes, for which it was established; it could not at all times settle their claims and their duties in such a manner, as is most conducive to the good of the whole, and of the several individuals, which make up that whole.

Legisla-  
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implies a  
power of  
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pealing  
laws.

Legislative power implies a power of enacting penalties.

IV. The legislative power implies farther a power of establishing laws in such a manner, as to make them effectual; that is in such a manner as to secure the observance of them. For it would answer no purpose at all to shew men what their duty is, if they were afterwards to be left at liberty either to discharge or neglect it, at their own discretion, without apprehending any particular inconvenience to themselves from not complying with the rules, which the common understanding of the society has enjoined. It is possible indeed, that in some instances the share, which any individual might promise himself in the general good, would lead him to comply with those laws, which he sees will be productive of such a good. It is possible too, that in some instances, where he either did not see the general usefulness of laws, or did not apprehend, that he should have any share in the general good, which they produce, he might be willing to comply with them, out of a proper regard and deference to the public understanding; especially if he found no particular inconvenience to himself from such compliance. But even where the laws made by the public are conducive to a general good, in which the several individuals will probably have a share; many are so selfish, as not to be satisfied with such a remote and seemingly small advantage, and are desirous of grasping at what they think will be of greater and more immediate benefit to themselves; however inconsistent it may be with the benefit of the public. Even where men would feel no particular inconvenience from complying with the laws, which the common understanding has thought fit to establish; many, are so conceited and petulant, that instead of obeying a law, because it has been established by the common understanding, they would look upon this as a reason, why they should disobey it, as far as they safely can.



Something farther therefore is necessary to secure the observance of such rules, as the legislative power establishes, besides the mere establishment of them: especially since the advancement of the general good will frequently require not only such laws to be made, as will be productive of more benefit to each individual, than he could obtain without observing them, or such as all may observe without any inconvenience to themselves; but such likewise, as may cut off many individuals from some private benefit, which they might otherwise have obtained, in order to advance the greater benefit of other individuals and of the public in general. One method therefore of securing the observance of laws is to establish them under some penalty; the view of which may check the petulance of those, who would otherwise have transgressed them without any reason at all, and may give a proper turn to the selfishness of those, who would otherwise have transgressed them upon reasons of private interest. Whether this is the only method or not, shall be considered hereafter.

We may take this matter still higher. All mankind in the liberty of nature have a promiscuous right of punishing criminal actions. But those, who are united in a civil society, have agreed to put themselves under the conduct of the common understanding, to have their duties regulated, and their rights adjusted by the legislative power of that society. And as this power, when it makes laws, regulates the duty of the several individuals, by declaring what actions appear to the common understanding to be contrary to their duty, and are to be treated as crimes; so the same power, when it enacts penalties, adjusts the right of punishing such crimes, by declaring or appointing what punishment is to be inflicted on these, who are guilty of them. So that the power of making laws and enacting penalties is only

one and the same power exerting itself upon different objects : in making the law it exerts itself in ascertaining the rules of duty ; in enacting the penalty it exerts itself in adjusting the right of punishment.

Legisla-  
tive power  
implies a  
power of  
taxing the  
subjects.

V. As it belongs to the legislative power of a civil society to direct the several members of it what they are to do for the common good ; so it belongs to the same power to direct them likewise what they are to give for this purpose ; that is, the power of raising money to answer the expences, which the society must make in its political capacity, or in pursuing the ends, for which it was formed, is a branch of the legislative power.

The payment of such money, as these purposes require, is an obligation, which each individual lays himself under, when he becomes a member of civil society. He tacitly agrees, by this act of becoming a member, to contribute his endeavours towards advancing and securing the general good. And since the general good of the society cannot be advanced and secured, nor even the society itself be kept together, without a public revenue, this agreement binds him to pay his share towards such a revenue. This then is a duty of every individual, who is a member of civil society. And consequently it belongs to the legislative power to settle what share each is to pay : because it belongs to the legislative power to adjust and ascertain the duties of each.

This right of the legislative power over the property of the subjects is not a right to take the whole, or indeed any part of it, from them causelessly and arbitrarily. The preservation of each mans property is one of the ends, which he proposed to himself in entering into civil society. But it is absurd to suppose, that he would give up the whole of his property for the sake of preserving it. And the right, which the society has, either over his person or over his property, is to be measured by what he may reasonably be presumed willing to

give up for the sake of obtaining those ends, which he proposed to himself in becoming a member of such society. It is indeed reasonable to presume, that each individual would be willing to give up a part of his property for the sake of enjoying the rest in peace and security. It is therefore the business of the legislative power to consider and to direct what part of each man's property it is worth to have the rest secured to him. Now the security, which he has in view, depends upon the preservation and welfare of the public. And for this reason the legislative power, in settling what each person is to pay, should consider how much of each person's property it would be worth to him to preserve the state and advance its welfare : because whatever appears to the common understanding to be necessary for these purposes, is what every person who belongs to the state, is naturally presumed to be willing to part with. Upon this account the burden of those payments, which are called taxes, or duties and customs upon goods both moveable and immoveable, ought to be proportioned, as near as may be, to the value of each person's property : because the more a man's property is worth, the more he is naturally willing to pay for the security of it. From hence we may see the reason, why these payments are naturally made higher in times of public danger, than in times of peace and quiet : the more a man's property is exposed to danger, and the more expence the society is at in defending and securing it ; the more he is reasonably bound to pay for having it secured.

It might perhaps be of public benefit, if the state could get possession of a private man's lands. The society may want them for enlarging their roads, for erecting fortifications, or other public works of general utility. The principles here laid down will shew us, that



the right, which the legislative power has in the property of individuals, will not justify the taking such a man's lands from him, without making him amends. Such a tribute as this would not be a tax, which all the members pay in proportion to their property; it would be a payment exacted of one man for the benefit of the whole, and would therefore be contrary to the nature of civil society, which requires, that the burden of all such public payments should be borne by the several members, in proportion to the interest, which their property gives them in the general utility. But though the public should force him to give up his land, the burden is borne by all the members, if amends is made to him for it.

Some taxes or duties are paid indeed rather for the security of a man's person, or for the quiet enjoyment of some personal conveniences, than for the security of his property: such are poll-taxes, duties upon marriages, and many others of the like sort. But the same principles, with very little variation, are applicable to these payments. They are a part of a man's property, which he is presumed to be willing to give to the society, for the defence of his person, and for the quiet enjoyment of these personal conveniences. The chief difference between these taxes and others is, that since such advantages as these are of equal value to all, the tax, which each pays to the public for securing them, may reasonably be an equal one: whilst other taxes, which are paid for the security of each person's property, follow the value of that property, or are proportionable to the worth of it.

Executive power is either internal or external, or mixed.

VI. The natural use of the joint strength, which a civil society forms, is either to preserve the rights and enforce the duties of the members of such society, in respect of one another, and of the public; or else to protect the whole and the several parts of it against such

injuries, as other civil societies, or other individuals, who still continue in a state of nature, or who are members of other civil societies, might do them; to prevent such injuries from proceeding, where they are begun; or to procure reparation, and inflict punishment, where they are completed.

Now the executive power is a power of acting with this joint strength, in order to obtain the purposes, for which such strength was formed. And consequently the executive power is either internal or external. We may call it internal, when it is exercised upon objects within the society; when it is employed in securing the rights or enforcing the duties of the several members, in respect either of one another or of the society itself. And we may call it external executive power, when it is exercised upon objects out of the society; when it is employed in protecting either the body or the several members of it against external injuries, in preventing such injuries from being done, or in procuring reparation or in inflicting punishment for them, after they are done. These two branches of the executive power may, if we like these names better, be called civil and military. Civil executive power is a name, which will very well express all, that is meant by internal executive power. And the only objection, against calling external executive power by the name of military executive power, is, that something more is included in this branch of power besides what is strictly called military.

VII. Judicial power is the internal or civil branch of executive power exerting itself under such checks and controls, as the legislative power has subjected it to, in order to prevent its deviating from the purposes, for which it was formed. A legislative power without an executive one would be of no great use. It might indeed ascertain the rights and determine the duties of

Judicial  
power is  
internal  
executive  
power.

the subjects; but unless the common strength of the society comes in to its assistance, that is, unless the executive power interposes to support those rights and to enforce those duties, the laws might fail of obtaining their effect; it would depend upon the virtue or upon the humour of the subjects, whether they should obtain it or not. On the other hand an internal executive power, which is under no checks or controls from the legislative, would be more dangerous than useful: it must be either a brute force uninformed and unguided by any intelligent principle, or else a discretionary power in the hands of them, who are entrusted with the management of it. In the former case the wrong or the right application of it would be merely accidental; and in the latter case it would probably be oftener made use of as an instrument of private interest and undue favour, of avarice or oppression, of revenge or cruelty, than as the means of doing justice to the public and to the several members of it.

But in matters of internal jurisdiction the executive power will plainly appear to be such an one, as is calculated to answer its proper purposes; if we consider it as acting in this instance under the direction and conduct of the legislative. Now as the legislative power adjusts and settles the rights of the several members of a civil society, it naturally belongs to this power to determine, how far, and upon what occasions, they shall have a right to the interposition of the common force, that is, it naturally belongs to this power to direct the use and extent of the internal executive power. Effectual care will be taken about the due use of this common force, if provision is made, that it shall not be put in motion in criminal matters, unless the fact to be punished is first made evident in the eye of the law, that is, in the judgment of the public understand-



ing speaking by the law ; and unless the fact, when so made evident, is such an one as the law has declared to be punishable : and if a farther provision is made, that, after the fact is clear, and the legal guilt of it is apparent, no other use shall be made of this common force, besides what the law allows, that is, that no other punishment shall be inflicted, but what the law has prescribed. The like care is taken, if a like provision is made, in matters of claim for restitution or damages done ; if the law does not allow the claimant to have any assistance from the common force, till his right is made evident in the same manner ; and then allows him no farther assistance from it, than what the law has determined to be sufficient to enforce his claim, or to obtain satisfaction.

We may observe here, that the judicial power is divided into two branches ; one is called civil judicature, and the other criminal or penal judicature. The former acts with the common or joint force of the society to obtain restitution of what is unjustly withholden, or reparation for damages done. The latter acts in like manner to inflict punishment for the guilt of crimes committed.

The name of judicial power, which belongs to this power in both these branches, has probably been what leads many writers upon this subject to distinguish it from executive power. Having determined the notion of executive power to consist in a power of using and applying the joint force of a civil society, they do not immediately see, how it could ever be called by the name of judicature ; since judicature implies an act of the common or public understanding, and not a mere exercise of the common force. In the mean time they are aware, that judicature and legislation are different things, that the former is the application of such laws,

as are derived from the authority of the latter. And thus, as they distinguish the judicial from the executive power on the one hand, so they distinguish it likewise from the legislative power on the other hand. The consequence of which has been, that they consider the civil power as consisting of these three several parts, legislative judicial, and executive. Whereas in fact the province of judicial power is plainly to direct and apply, to actuate or restrain, the public force of the society; and in this view it can be nothing else but a branch of the executive power. All the formalities, which precede this application of the public force, are so many checks and controls, which the legislative has fixed, to prevent an undue application of it. Courts of judicature are the means, by which the legislative controls the the executive. Their proceedings are settled by the direction of the legislative; and the executive acts under their direction. The name of that power, which such courts exercise, regards them indeed as the instruments of the legislative, rather than as the principal agents of the executive; as checks of the common understanding upon the common force, rather than as the springs, which put that force in motion, and direct its application. But in whatever light the judicial power might be considered by them, who gave it this name; its efficacy and the use, that it is of to civil society, arise from its being executive in its nature. Courts of judicature might meet, might hear causes, and might give sentence upon them, as the laws direct; but these sentences would be nothing, they could neither redress injuries nor inflict punishment, if such courts had not either an original or a delegated power of acting with the joint force of the society to put their sentence in execution.

External  
executive  
power or  
military  
power.

VIII. The second branch of executive power, which is called external executive power, or may, if we like the name better, be called military power, is the power of acting with the common strength or joint force so

the society to guard against such injuries, as threaten it from without ; to obtain amends for the damages arising from such injuries ; or to inflict punishment upon the authors and abettors of them. The force of the society, as it is employed upon these objects, is called its military force. And the only objection against calling this whole branch of the executive power by the same name is, what has been <sup>u</sup> hinted already, that this external branch of executive power, or rather the persons vested with it, are employed, not only in the actual use of the common force, but in regulating, abating, or stopping it. Thus if the society is attacked or any of its rights are infringed by foreign enemies ; it is the usual province of them, who are vested with this power, not only to make war upon such enemies, but likewise, as the circumstances of the case may require, to suspend the war by a truce, or to end it by a peace. Nor is this usually the whole of their province. As a civil society may be attacked by more or by stronger enemies, than it can conveniently, or perhaps than it can at all, defend itself against by its own strength ; there is frequent occasion to call in the assistance of others to help it. And because the procuring and engaging such assistance, as well as the actual use of it, when procured is usually considered as an act of the common force ; this is looked upon as a part of external executive power. Farther still ; as this power acts with the common force of the society against its foreign enemies, where those enemies infringe its rights, and likewise stops or suspends its action, where the purposes of using it are answered, or are likely to be answered ; the power of adjusting the rights of the society in respect of foreigners is commonly connected with external executive power, and is considered as a part of it. Hence it is, that, when we are speaking of external



executive power, we are supposed to include under that head, not only what is properly called military power, but the power likewise of making war or peace, the power of engaging in alliances for an encrease of strength, either to carry on war or to secure peace, the power of entering into treaties, and of making leagues to restore peace, where there has been a war, and the power of adjusting the rights of a nation in respect of navigation, trade, &c. by conventions or agreements.

However, though these several powers are usually connected with external executive power by being lodged in the same hands, they are not naturally essential parts of it. These several powers are rather acts of the common understanding, than of the common force; and therefore seem, in their own nature, to be parts rather of the legislative than the executive power. But where the legislative and the executive power are lodged in different hands, and especially in those civil societies, where the former of these powers resides in the whole body, or in a considerable number of representatives; the usual practice is to allow some degree of discretionary power in respect of war or peace to him or to them, who are entrusted with the right of putting the military force in motion; especially in those instances where the legislative body cannot act with such readiness and expedition, as the occasions or opportunities of war require. And since war is the means by which, in the last result, all the rights of the society in respect of foreigners must be defended and maintained; it is usually thought convenient that those rights should in some measure be under the inspection and management of the same person, or persons, who are employed in looking after and managing the occasions and opportunities of war. So that where the public understanding cannot direct by settled rules, which have

been established beforehand, but must act if it acts at all, as occasion offers, and particularly where this public understanding is the joint sentiment of a great number of men, and cannot for that reason be collected or made known on a sudden; in these cases and in others, which are naturally connected with them, it has in most civil societies been thought convenient to allow those a discretionary power of acting, who have the external executive power, or to substitute their judgment in the place of the public understanding.

This however, though it may be convenient, is not necessary: for the legislative body, where no positive law of the constitution forbids it, may appoint its own agents, distinct from those, who actuate the common force: it may naturally not only make war or peace by its own authority, but may send its deputies along with the army to control its operations even in war. Except indeed in the heat of action; where, unless there is a discretionary power lodged in the hands of those, who have the military command, it would be impossible for them to do their duty. If the right of doing this is naturally implied in the notion of a public or common understanding formed for the purpose of directing a civil society; that is, if a right to direct such affairs, as relate to external jurisdiction, is naturally implied in the notion of legislative power; the consequence is, that in those particular civil societies, where by the constitution of government they, who are intrusted with the external executive power, act in any instance of external jurisdiction at their own discretion without any immediate control from the legislative, this discretionary power must be considered as originally connected with the legislative: it must be so considered in this sense at least, that though the fundamental laws of the constitution may take it unconstitutional

in after times for the legislative body to take this power to themselves, yet there was from the beginning no natural reason, or no reason drawn from the nature of civil society or of civil power, against their preventing any such discretionary power from being established by general consent, or from establishing itself afterwards by long usage and custom.

In short, the external executive power, in its own nature, is no more an independent power of acting without being controlled by the legislative, than the internal executive power is. Even in those civil societies, where the particular constitution has left this power discretionary in some instances, it does not suffer it to be so in all. And by the checks, to which it is subject, in other instances, we are naturally led to judge, that, if the positive will or appointment of the legislative power, considered as acting originally in modelling the civil constitution, had not from the beginning established the contrary, it would have been subject to the like checks in all.

These checks appear principally in those instances, where, without any great inconvenience to the society, the external executive power may be directed by general and standing laws, or rather in those instances, where it could not without great inconvenience be left independent. \* Thus the legislative power, notwithstanding the executive is in some other respects left independent, determines what number of the members of the society shall be armed in order to join their force for repelling or subduing its external enemies. It determines to what laws or to what sort of military discipline they shall be subject, who are thus armed. It determines in what manner they shall be maintained or paid, in order to make them amends for giving up other employments and engaging in this, to which, as members of the society, they were no more obliged than the other members



In alliances, leagues, or conventions, if they bind any of the members to give up their private claims, or to do any thing, which is inconsistent with the civil laws then in being, its authority makes them void of course, unless it interposes to establish them. In particular, if such agreements cannot be made good without money to be raised by a tax upon the property of individuals; if new duties are to be imposed upon any commodities or duties established already are to be abolished; such agreements are not valid by any discretionary act of the executive power, but may either be made void or confirmed by the legislative. These are plainly natural checks of the legislative power upon the executive, and are sufficient to shew, that the latter is not a discretionary power, but is in itself under the control of the former. So that wherever it is otherwise, in whatever nation we find a discretionary executive independent in any instances upon the legislative, we may conclude that it owes this independency to civil constitution or positive appointment, and does not derive it from its own nature.

IX. By magistrates I would here be understood to mean such persons in a civil society, as put the common force of it in motion, or act with that common force. I use the word therefore in a more extensive sense, than it is commonly used, to mean not only such persons, as act with the common force in the judicial or internal branch of the executive, but such persons likewise, as act with that force in the military or external branch. The name of magistrate in the usual sense of the word, is appropriated to the former: the latter are generally called officers, where the executive power is purely military, and ambassadors, ministers, envoys, &c, in the rest of that branch of the executive power, which is external. According to this notion of magistrates, they are the agents of the executive power; and con-

Appoint-  
ment of  
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ecutive  
power.

frequently the appointment of them belongs to this power. But because their province is partly internal and partly external, the power of appointing them belongs partly to one branch of the executive and partly to the other ; so that it may not be improper to call this mixed executive power.

It is necessary however to take notice of a difference between internal and external magistrates. The judicial power, which belongs to internal magistrates, is under the constant and steady control of the legislative ; their power of acting with their public force is regulated and limited by standing laws. And consequently the nature of their jurisdiction is defined or settled by the legislative : though the power of exercising such jurisdiction is derived from the executive : it so far belongs to the legislative to erect or appoint courts of judicature, as to appoint, that magistrates with this or that particular power may or shall be erected ; notwithstanding the persons themselves are chosen or nominated, and the powers, which they exercise, are derived from the executive. This would be the case likewise of external magistrates, supposing this branch of the executive power to be under the like uniform control of the legislative. But in most civil societies, where there legislative and executive are in different hands, the constitution leaves the latter in some instances a discretionary power, as to the external branch of it. And for this reason such magistrates, as have their province of this branch, not only derive their power from the executive, but are likewise under the regulation of the executive, as to the degree or extent of their power.

\* Grotius divides civil power into the five following parts ; first the power of making, altering, or repealing laws, both such as concern sacred, and such as concern other matters, as far as the former re-

late to or affect the state. Secondly the power of making war or peace, of engaging in treaties, leagues, alliances, or conventions. Thirdly the power of establishing taxes, customs, or duties to be paid out of the property of individuals for the public use and service. Fourthly, the power of hearing and effectually determining all matters of controversy, which arise between individuals. And fifthly the power of appointing magistrates, ambassadors, or other officers. Though I have not kept to this division, the reader will be able to see, without much trouble, that all these several parts of civil power have been taken notice of, and been reduced to one of the two general heads, into which I have divided it; they are all of them branches either of the legislative or of the executive.

X. If we continue to speak of the legislative and executive power in the abstract; it will be difficult to explain rightly, what is meant by prerogative. It cannot properly be called discretionary executive power; because the executive power in the nature of the thing is not discretionary in any part: wherever it acts at discretion, this privilege, unless it arises from the necessity of the case, as in the heat of military action, comes from the legislative either by original establishment, or by long usage and custom, or by occasional permission. We shall be better able to understand what prerogative is, if we speak of the legislative and executive power, not in the abstract, but as lodged or entrusted by the state in the hands of some one or more persons. Where the person, so entrusted with the executive power, is left by the legislative to act in any instances, at his own discretion, to direct by his own understanding the public force, which is naturally under the direction of the public understanding, such a discretionary power in him is called prerogative. Thus

Prerogative what.



in penal cases, if the legislative forbids the public force to be put in motion for the punishment of any action, till the fact itself is proved to the public understanding in such a manner as the law appoints, and then will not suffer this force to be used but under the conduct of the law, so as to inflict only the legal penalty; thus far there is no prerogative or no discretionary power in him, who is entrusted with the executive. But then if the legislative, instead of reserving to itself the right of judging, whether such legal punishment is to be suspended, or whether the criminal is to be wholly pardoned, leaves it to him to pardon or not, as he thinks proper, such a discretionary power entrusted with him is called prerogative. In cases of external jurisdiction; if the society makes war or peace, as he thinks convenient, if it is bound by such leagues or conventions, as he engages it in; if its military force, when appointed and established, is under his command, and is to act as he directs; these are instances of a discretionary power: and where the person entrusted with the executive has such a discretionary power, it is called prerogative. If he, who is entrusted with the executive, has a discretionary power of calling the public together to act in its legislative capacity, or of calling the representative of the public together, where it acts in this capacity by its representatives; or if it is left to him to appoint the time and place of its meeting; this, though it is not properly any branch of executive power, yet if it is so entrusted with him who has the executive power, will come under the notion of prerogative. But should the legislative ever have limited him in this respect, and tied him down to call them together at any particular time or place; so far this prerogative is at an end; and the act of calling them together, though it might once be an act of prerogative, and

so may still retain the name, becomes in its nature ministerial.

We may from hence learn, that in those nations, in which there is any struggle between the legislative body and the person or persons, who are entrusted with the executive power, this is not a struggle between the legislative and the executive powers. The provinces of these two powers considered abstractedly, or as they are in themselves, are marked out distinctly enough for any one to see their respective limits. It belongs to the legislative power, considered as the common understanding, or joint sense of the body politic, to determine and direct what is right to be done : and it belongs to the executive power, considered as the common or joint strength of the same body, to carry what is so determined and directed into execution. But in those particular civil societies, where the legislative and executive power are lodged in different hands, it is usual, especially if the legislative body is a large one, to allow those, who have the executive power, to act discretionally in some cases, that is, it is usual for them to have in some instances such a discretionary power as is called prerogative. And the only subject of dispute about prerogative, that can be intelligible, is between the executive body and the legislative body, concerning the instances, where this discretionary power takes place, or else concerning the extent of it in some particular instance ; that is, they may possibly dispute, either how far in settling the constitution of government, such power of acting at discretion, vested in the executive body, was designed to extend, or how far it may be proper and convenient for the public, that it should extend.

The reader may perhaps have meet with some difficulties in this chapter for want of having attended to a necessary distinction between the legislative power of

civil society in general, and the legislative body of any particular society, and to a like distinction between the executive power and the person or persons, with whom such power is entrusted. The following chapter is the place, in which the subject will lead us to explain this distinction. And when it is explained, some passages in this, which may have appeared difficult, will probably be better understood.

Civil and  
military  
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uished.

XI. The force of a body politic, as it is employed in matters of internal jurisdiction, is called the civil force ; and as it is employed in matters of external jurisdiction, it is called the military force. The civil force is what the judicial or internal executive power acts with ; and the military force is what the external or military executive power acts with. These two forces therefore, though they may appear to be the same, when they are considered only as the joint force of the same body politic, are distinct from one another in respect of their objects. The civil force is employed in putting the laws in execution, that is, in maintaining and supporting within the society what is right in civil matters, or in inflicting punishment in those which though they are of a civil nature are distinguished by the name of criminal matters. The military force is employed in defending the society and its several members against injuries from without.

This, which is a distinction between these two forces in respect only of their objects, leads us to a distinction, which may, in some societies be made between the forces themselves ; when we consider one of them as the force, with which the internal executive power acts, and the other as the force, with which the external executive power acts. For the internal executive power is under the constant and uniform control of the legislative : whereas in most civil societies there is something



of a discretionary power joined with the external executive. The consequence of which is, that the civil force, or force employed to maintain justice within the society, is under the same control with the internal executive power: but the military force, or force employed against injuries from without, may in some instances be a discretionary force, not guided so much by the legislative body, as by the judgment of them, who are entrusted to act with it.

If the constitution of government has introduced such a distinction in fact; that is, if the military force is actuated by a discretionary power; there is an evident reason, why this force does not of its own right come in, where only the members of the society are concerned, in order to carry the laws into execution: because the force employed for this purpose ought to be such an one, as is under the checks and control of the laws, and not such an one, as in any respect acts at discretion.

The force indeed, which the society establishes to carry the laws into execution, is commonly a small one. What is done in this particular is considered as done by the joint force of the whole, though the whole, instead of rising for this purpose, acts by such civil officers, as the public understanding has thought sufficient. These are commonly but few; because few are sufficient to give a person possession of such rights, as the law has adjudged to him, or to inflict punishment after a legal sentence. However, if this small force is found insufficient, these civil officers usually call in any of the members of the society to their assistance in order to encrease their force. They sometimes call in the assistance even of the military force: upon which occasion it is considered, not as the military force, or not as having in any respect a discretionary power, but as a part of the civil

force acting under the direction of the civil magistrate. So that perhaps it might be more proper to say, that the civil magistrate upon some occasions, where he apprehends the usual force employed by him to be too weak to answer his purpose, calls in the soldiery to his assistance; than that he calls in the military force. The persons, which are usually employed by him are either too few or too unskilful to withstand the resistance, which he is likely to meet with. Therefore as there are many members of the society, who are the instruments of the external executive power, and who are trained up to oppose such violent resistances, as frequently come from without; he has recourse to them, and uses them as his instruments, subject, when they are so called in by him, to his control, and consequently subject, as he is himself, to the control of the law.

## C H A P.      I V.

Of the different forms of civil  
government.

- I. *Sovereign and supreme power what.* II. *Legislative and executive power compared.* III. *Civil constitution what.* IV. *Origin of civil constitutions in respect of the legislative.* V. *How a civil constitution becomes fixed, as to the legislative.* VI. *Executive body how formed.* VII. *Despotic constitution how produced.* VIII. *Executive body how fixed.* IX. *National constitution a question of fact.* X. *Monarchical constitutions not more natural than others.* XI. *Monarchical constitutions not impossible.* XII. *Constitutions not necessarily democratical.* XIII. *Titles or appearances do not determine the nature of a constitution.* XIV. *Tenure of civil power to be distinguished from the power itself.* XV. *Promise or oath of a king may limit his power.* XVI. *Mixed constitutions.* XVII. *Civil constitutions may be altered.*

I. **W**HEN we speak of sovereign power or of supreme power, we are led into some mistakes, by using these words indiscriminately. When we call any power supreme, the expression seems to be relative to some other subordinate powers: to call any power the highest of all is not very intelligible; if there are no other powers below it. Sovereign power is likewise a relative term; but then it has not a necessary relation to subordinate powers. To call any power by the name of sovereign power does not necessarily imply, that there are any other powers in subordination to it. Whatever power is independent, so as not to be subject to any

Sovereign  
and sup-  
reme  
power  
what.



other power, though it has in the mean time no other power subject to itself, may with propriety enough be called by this name. In short, that power may well be called sovereign, to which none is superior: whereas none can be called supreme, unless there are others inferior to it.

<sup>a</sup> Grotius indeed has not observed this distinction: he defines supreme power, as I should define sovereign power, to be such an independent power of governing a civil society, that no acts, which are done by it, can be made void by any other human power. In this sense every state, in reference to all other states, has supreme, or, as we might better call it, sovereign power within itself: it governs itself independently, and no other state has authority to make its acts of government void. A society of men, by whatever ties and for whatever purposes they may be united to one another, is not complete in itself; if it has not within itself, an independent power of government, but is, either in its legislative or in its executive subject to be controlled by any power from without. Such a society therefore though formed for civil purposes, is no civil society; it can at best be only a part of some other state, and is usually called a province to that state in particular, from which it receives its laws, or by which its public force is put in motion and made to act.

Every individual in the liberty of nature is his own master, and has an independent or sovereign power over himself. The consequence of which is, that when a number of such individuals are united together, so as to form a society, this society is naturally its own master, and has an independent or sovereign power over itself. Since no person, and no collection of persons, out of the society, has naturally any authority over any individual within it; the consequence is, that no

<sup>a</sup> L. I. C. III. §. VII.

other civil society can have any authority over a body politic made up of such individuals.

If indeed any one body politic has consented to submit itself to the authority of any other body of the same sort; it ceases to be its own master, it has no longer an independent or sovereign power of its own.<sup>b</sup> But then it ceases at the same time to be a state and becomes a province. No assembly of men is called a state, unless it is complete in itself: and no assembly of men united for the purposes of advancing a common utility and of securing their rights can be complete; if it has not within itself whatever is necessary to answer those purposes; if, instead of having a legislative and an executive power of its own, it is obliged to have recourse to some other society or assembly of men to ascertain the rights and to prescribe the duties of its members, or to maintain those rights, when they are ascertained, and to enforce the observance of those duties, when they are prescribed.

II. The not having attended to the distinction, already taken notice of between the notions of sovereign and supreme power, and the promiscuous use of these two words, may possibly have been one occasion of a seeming difference in opinion between those, who, if they were to explain their meaning, might possibly be found to agree. The executive power in any state may undoubtedly be called sovereign power: because, in reference to all other states, it is an independent power. It is not naturally subject to the restraint, or to the direction of any power out of the society. Where it is subject to any such external restraint, there is no state, but a province only, a part or member of some other society. Now as the terms sovereign and supreme power are used indiscriminately; we are apt to conclude, that

Legisla-  
tive and  
executive  
power  
compared.

<sup>b</sup> Grøt. *ibid.*

the executive, because it may in this sense be called sovereign power, is likewise to be considered as supreme power. But then the enquiries upon this head are usually carried something farther. The legislative and the executive power in the same society are sometimes compared together: and then the question is, which of these two is to be looked upon as the supreme power. It is not uncommon to imagine here, that executive power, because it is called sovereign, and is therefore looked upon as supreme in one reference or comparison, may likewise be called sovereign, and be looked upon as supreme in this other reference; so that if the legislative power is not subordinate to it, they must at least be independent one of the other.

The distinction of the two names sovereign and supreme, if it was attended to, would correct this false conclusion. The executive power of any one civil society in reference to the civil powers, either legislative or executive of any other civil societies may indeed be called sovereign power: because it is independent of them, and does not act under their direction. But then in this reference it is not very proper to call it supreme power; because though such foreign powers cannot of right direct or control it, yet they are not subordinate to it. And if, by proving the executive power, of any particular society, to be sovereign power in this reference, it does not follow, that it is to be called supreme power in the same reference; much less will it follow, that we are to look upon it as supreme power in reference to the legislative of the same society.

Indeed there is in almost every state what may be called supreme executive power, in reference to some other powers within the state itself. When an executive body is fixed by the constitution of government in any civil society; whether this body consists of one person or



more ; there are usually many other subordinate persons, or bodies, who have such a derivative and inferior jurisdiction, as commits the public strength of the society to their management in many instances. These inferior magistrates therefore have an executive power : but as it is derived from the person or persons, with whom the executive is originally entrusted ; this power is inferior or subordinate to his : and in this reference his executive power may be called supreme. But this again is no evidence, that the executive power, either in itself, or as it is entrusted in his hands, is superior to the legislative or even independent of it. There can certainly be no ground for concluding, that the executive power in his hands is supreme, when compared with the legislative ; only because it is supreme, when compared with the executive power in other hands.

If we consider the nature of these two powers, there will be no great difficulty in judging, which of them is supreme, when they are compared with one another. The legislative is the joint understanding of the society directing what is proper to be done, and is therefore naturally superior to the executive, which is the joint strength of the society exerting itself in taking care, that what is so directed shall be done.

As legislative power is thus found to be superior to executive, when they are considered in the abstract ; we are apt to conclude too hastily, that in every civil society the legislative body is in all instances superior to the executive body. Whereas in fact the constitution of government may in some instances have lodged a discretionary power in the executive body : so that though in general the public understanding speaks by the legislative body, yet in these instances the understanding of the executive body may be designed to stand in the place of the public understanding, and to direct

what is to be done as well as to see to the doing of it. For the existence of a legislative body is not wholly inconsistent with the notion of prerogative.

Civil con-  
stitution  
what.

III. By the civil constitution of government in any nation is meant the established form of exercising the supreme or governing power within that nation, which we have just now proved to be the legislative power of it. The simple constitutions of government are commonly reduced to these three, monarchy, aristocracy, and democracy: by which we are to understand, that there are three different sorts of legislative bodies; any of which may be established in any nation; and each of which may be called simple, because each of them is uniform or alike in all its parts. The constitution is democratical, when the legislative power is exercised either by the collective body of the people, or by representatives which they chuse from time to time. It is aristocratical, when this power is exercised by the nobles, that is, by a small and select body of men, who after their original designation to this office are elective no longer, but transmit their power to their heirs or to other established successors. It is monarchical, when this power is exercised by a king, that is, by a single man; whether upon his demise it is transmitted to his heirs, or to other established successors, or to such successors, as shall upon that event be chosen. We cannot indeed properly say that in this last form of government all the parts of the legislative body are alike; because the whole body consists of only one person: the form however is a simple one; because there is no mixture or diversity of parts in it.

The constitution of government is called a mixed one, when two or more of these simple forms are compounded, or joined with one another. Thus the legislative body may consist either of the whole body, or of a representative body of the nobles and of the people; or

of the king and the people ; or of the king and the nobles alone ; or of the king, and the nobles, with the representatives of the people.

The mixture in this last form will be a little varied, if the king is entrusted with the executive power in such a manner as to have any prerogative joined with it : or if the representatives of the people claim a right of establishing any sort of laws, whether relating to the public revenue or to any other matter, and the consent of the other two parts of the legislative body to such laws is considered as a thing of course, which they are not to refuse. In either of these cases the form is still a mixed or compound one, though the composition is not quite the same. In the former case it approaches towards monarchical, and the latter towards democratical.

IV. When a number of persons, who are equal to one another, that is, who are free, <sup>d</sup> as all men naturally are free, from any jurisdiction or authority over one another, have united themselves into a civil society ; the natural result of such an union is a legislative power. But then there is originally no legislative body distinct from the collective body of the society. <sup>e</sup> All and each are obliged to conform themselves to whatever the whole or the major part shall agree upon : but as no one person, nor any select number of persons, can have any right to prescribe to the rest ; so neither is this collective body of men naturally obliged to elect or settle a number of representatives, who shall have authority to act for them, or to determine what is to be done and what to be avoided. Each member of the society has originally a right to act for himself, as a member, that is, to deliberate with the rest, and to give his suffrage upon such points as come before them. It is necessary therefore to look farther than the com-

Origin of civil constitutions, in respect of the legislative.

<sup>d</sup> See B. I. C. X. § III.

B. II. C. I. § II.



pact, by which men unite themselves into a civil society, in order to find out the origin of any other civil constitution of government, besides such an one as is popular or democratical in the fullest extent of that word.

There is indeed an original <sup>f</sup> legislative power in every civil society; but some farther act is necessary, besides the mere union into such a society, before this power can be naturally vested in any one part of the society exclusive of the rest; before a king, or the nobles, can have a right of making laws, which shall bind the whole; or before the people shall be obliged to act by representatives, or to be concluded by the sense of any part of the society, instead of acting in the collective capacity, so as to be concluded by nothing less than the general sense of the collective body. All men, before they are considered as members of a civil society, are equal to one another, and are likewise independent of one another; each has naturally a right to think and to act for himself. This independency is in some measure limited by their entering into civil society. If there is no express agreement, yet the very act of entering into such society is a tacit agreement, which makes them so far dependent upon the general sense and will of the whole body politic, that they are from thence obliged to conform themselves to that general sense and will. But if they are considered merely as members of a civil society; if nothing more is supposed to have passed, besides that agreement, either express or tacit, by which they united themselves into such a society; they would still have a civil equality: this union, though it has produced a legislative power, has not lodged it in any particular hands; it leaves each member as free to act for himself in a civil capacity, as he before was in a natural capacity. From hence

<sup>f</sup> See B. II. C. III. § I.

then it follows, that the obligation of being subject to a legislative power in any one man, or in any body of men, though this body is within the society, if it is different from the whole collective body, is a farther abridgment of natural liberty, than what arises merely from the agreement, by which mankind unite themselves into civil societies. But every abridgment of liberty, which is made without our consent, either express or implied, is contrary to the law of nature. No civil constitution of government therefore, which is not purely democratical, can be established consistently with the law of nature, without a farther agreement between those, who are members of the same civil society: we may indeed say, that without such an agreement no constitution of government, that we know of, or read of, could have been formed: because there does not appear ever to have been any constitution so entirely democratical, as to allow every member an equal suffrage in all matters of legislative power. In the most popular forms of government, persons of no fortune, women, and such as are in their civil minority, whether they are in their natural minority or not, are usually excluded from having any share in the exercise of the legislative power.

There is no great difficulty in conceiving, that no single person can claim the legislative power in a civil society, in consequence of that compact only, by which the several members united themselves into one body, with a view of preserving their rights and of advancing a general good. An exclusive legislative power in a king must plainly be the effect of some farther compact. Nor is it more difficult to understand, that there cannot without such farther compact be any such thing, as an aristocratical constitution of government. There is not naturally in any civil society, mere-

ly as a civil society, any select and standing body of men with an exclusive legislative power. Whenever a power of this sort is lodged in such a legislative body, it must, in order to be consistent with the natural rights of mankind, have been lodged there by some other act, besides the original agreement, upon which the society was formed. The necessity of supposing such a subsequent act is not so apparent in democratical constitutions. But yet it will, upon enquiry, be found necessary to suppose such a compact; if we consider what constitutions are called democratical. In many constitutions, which are so called, the legislative power is vested in the representatives of the people, and is not exercised by the collective body. Here then we plainly find another compact besides that, which formed the society: at least we find an act of electing such a representative body and of delegating the legislative power to it: which act is different from the original compact, that joins the several individuals into one civil society. Suppose, that each member of this representative body is chosen for life, and that upon every vacancy, by the death of any member, the collective body has the right of filling up such vacancy: we may ask on the one hand, how each member came to have a right to make a part of the representative body, as long as he lives? that is, why the collective body has not a right of displacing him, so as to make a vacancy, till he dies. It will be impossible to shew, that he has any such claim, against the collective body, from the nature of civil society, without having recourse to some farther act, besides that, which formed the society by uniting the several members of it into one collective body: and this farther act I have here called compact. If there had been no such compact or settlement; no reason can be assigned



from the mere nature of society, why the legislative power should be vested in the representatives of the people, rather than be exercised by the collective body; or why, if such representatives are once chosen, they should continue for life, rather than for a certain number of years, or rather than during the pleasure of their constituents. Suppose again, that the legislative power is vested in representatives chosen for a certain term of years; this is so far from being a form of government, which arises immediately from the nature of civil society, or from the original compact, by which such societies were formed, without the aid of any farther agreement, consent, or compact, that a form of government of this sort would be precarious; it could in its own nature last no longer, than during the term of years, for which the appointment of the representatives was made, but must upon the expiration of this term be continually renewed by such consent or compact. For when the term is expired, for which the representative body with legislative power was chosen; the legislative power would naturally return to the collective body, in which it was originally vested. And this collective body would then be at liberty to act, as they please, in regard to the future exercise of that power. The people in general might either keep it and exercise it themselves; or they might chuse a representative body, which should continue, either for the same, or for a different term of years, or during the lives of each representative member; or they might appoint a body of nobility, and give legislative power to them and their heirs, or to them and such successors as should be then settled; or lastly they may delegate the legislative power to one single person, and so introduce a monarchical constitution.

Even in constitutions, which approach as near as any, that we know of, to perfect democracies, some farther compact, besides that, which formed the society, must be understood to have intervened in order to settle the legislative body. The nature of civil society does not exclude women from having a suffrage in making laws; that is, it does not exclude them from being a part of the legislative body. If from observing either our own manner of chusing representatives, or the manner of making laws in other forms of government, where the people act in a seemingly collective body, and not by their representatives, we have been led to imagine, that women are by the nature of civil society excluded from a share in the legislative; we may correct this notion by considering, that <sup>g</sup> women, as well as men, have a natural right to their liberty, before they join themselves to civil society, and have, as well as men, a right to act as members of such society, after they have so joined themselves to it. The consequence of which is that till some act of the society, subsequent to the forming of it, has by general consent excluded women from a right of suffrage, they might naturally claim it. But perhaps the reader may be more readily led to correct his mistake, if we only ask him, whether he has never heard of a queen upon the throne, in those countries, where, by being seated there, she has a share in the legislative power, or makes a part of the legislative body? No civil laws, no civil constitution of government could give, or even allow, such a power, as this, to a woman; if it was contrary to the nature of civil society for a woman to have a share in matters of legislation. If then the reader, from such facts as these, is informed, that it is not contrary to the nature of civil society for women to have a share in the exercise of legislative

<sup>g</sup> See B. I. C. X. § III.

power; we may next ask him, by what means it comes to pass, that, in the most popular forms of government, they should not be considered as a part of the collective body in the business of legislation? Nothing but compact or agreement can have justly excluded them. If therefore, when the people are supposed to act in their collective body, whilst they exercise legislative power, the women, who are members of the society, make no part of that collective body; even such a democratical constitution as this must have been settled by some farther agreement, and did not naturally or necessarily arise out of that compact, by which the society was formed. What we have said of women may, without much variation, be applied to persons, who are <sup>h</sup> naturally at years of discretion, but yet are excluded from the right of voting in matters of legislation, even in the most popular forms of government, because they are not arrived at that period of life, which the civil laws of the country have fixed as the limit of minority. It will, I know, be thought a very obvious answer to this difficulty, to say, that the laws have excluded them. But this answer does not take the matter up high enough: for we are not enquiring how they came to be excluded, after a legislative body was formed, in which they have no share; but how such a legislative body came to be formed at all. Allow me only, that, till such laws, as exclude them, were made, they had a right of suffrage, as parts of the collective body; and this concession will be enough for my purpose. For if they are not excluded from such a right by the nature of civil society, the consequence is, that they never could have been justly excluded at all, if there had been no compact or agreement of the whole collective body, by which they were excluded. The same sort of reasoning is still farther applicable to

<sup>h</sup> See B. I. C. XI. § VIII.



persons, who are in their own power, that is, who are not slaves, and yet are not considered in the most popular forms of government, as parts of the collective body, only because they are possessed of little or of no land within the territories. The <sup>e</sup> nature of civil society does not exclude such persons from being parts of the collective body. If therefore they are excluded in the most popular forms of government; even such popular forms must have owed their establishment to some farther act, and cannot have immediately arisen out of the compact, by which men are considered as uniting themselves into civil society.

I have been the more particular in explaining this matter, because it does not seem to have been well attended to: and for want of understanding it we are led into many hasty and mistaken conclusions in several questions relating to civil government. The point, which I have been endeavouring to make out is in short, that, besides the compact, which unites a number of persons into a body politic, and gives them an original legislative power, as a collective body, it is necessary, that there should be some farther act of mutual consent, in order to settle any other legislative body; that is, in order to establish a form of government in any civil society whatsoever. Unless indeed we could find a society, where the government is popular in the fullest sense of the word; a society where all persons of free condition, who are old enough to be naturally capable of acting for themselves, whether they are men or women, poor or rich, have a share in the legislative power, and act by themselves, and not by their representatives.

But whilst we maintain, that to form a civil society, and to settle a civil constitution of government, two compacts or however two distinct acts of consent are

<sup>e</sup> See B. I. C. I. § XI.

necessary; there is no occasion to maintain, that these two acts should be done at different times. When we speak of that act, which produced the constitution of civil government, and formed a legislative body, as subsequent to the compact, which formed the civil society, and produced an original legislative power in the collective body; it is not necessary, that one of these acts should be subsequent to the other in order of time: for there is no reason in the nature of the thing that should hinder them from being done together. But still in the order, in which we conceive them, the compact, that establishes a legislative body, different from the collective body of the whole society, must be considered as subsequent to the compact, which forms the collective body itself: because we cannot conceive a legislative body different from the collective body to be settled; unless we first conceive, that such collective body has itself been formed.

Neither is there any reason for maintaining, that the compact, which settles the form of government or establishes the legislative body, must necessarily be an express one. As men may unite themselves to a civil society by tacit agreement; so likewise, when they are so united, they may by tacit agreement settle a form of government. Any of our alienable rights may be lost, and what we so lose others may acquire, by usage, custom, or prescription. The right of sharing in person in the exercise of legislative power, which originally belongs equally to every member of civil society, may not only be lost by the particular and express consent of each, but by the joint act of the majority, or by the long forbearance of all other members to use it, except those, who, by such long forbearance of the rest, are established into the legislative body.

We may now perhaps understand, what i Grotius means, when he tells us, that what he says in regard to kingly power in those countries, where the legislative or supreme power is lodged in the hands of one man, is equally applicable to the power of the nobility in aristocratical states, and even to the power of the people in democratical governments. For as a king, invested with legislative power, is to be considered as a legislative body, appointed by the consent of the collective body of the whole society; so the nobles in aristocratical states are a body of the same sort appointed in the same manner: and even in democratical states, since the legislative body is usually a part of the people, and not the collective body of the whole society, the legislative power of such body must be derived from the same principles, and must rest upon the same foundation with kingly power in monarchical constitutions.

How a civil constitution becomes fixed, as to the legislative.

V. Since the power of any legislative body within a society, whether such body consists of one person, or of more, depends ultimately upon a compact or agreement of the collective body; it is plain, that every constitution of government, where either the whole legislative body, or some part of it, is not always in being, must naturally be precarious. For there can be no compact but between two parties at least: and if one of the parties ceases to exist, the obligation of the other party is at an end. If therefore the power of the legislative body arises from consent, agreement, or compact, between such legislative body and the collective body of the whole society; whenever the legislative body ceases entirely, the collective body is free to act as it pleases. This has already been taken notice of, when we were speaking of civil societies, which act by such representatives as are chosen only for a term of years.



In those forms of civil government, where the people have a share in the legislative power, and act by representatives chosen for such a term; the constitution may however be so established, as not to be precarious; provided that those representatives of the people do not compose the whole legislative body, and that the other part of this body is conceived to be always in being. If there is no such part of the legislative body in being, the compact or agreement, upon which the constitution depends, will be no more than a compact between the people and themselves; a compact, which they may revoke at pleasure, because there is no other party in it. But if, when the term expires, for which the representatives of the people were chosen, there is still a king, who is a part of the legislative body; such a mixed constitution will be a settled one. He is the other party in the compact; and as on the one hand the constitution, or rather the compact, by which the constitution was regulated, does not allow him a full legislative power in his own person, but ties him up from exercising such power without the representatives of the people; so on the other hand the same compact obliges the people to go on in the same manner, that they have done before, that is, to exercise their share in the legislative power by representatives, and not to change the form of government, in any respect, by any act, which they may do in their collective capacity.

In an elective kingdom, if the king is the legislative body of the society, during his life, the legislative power will, upon his death, return to its first origin, to the collective body of the people: and there will be nothing, which can properly be called a civil constitution, to hinder them, when it is so returned, from making what alteration they please in the future form of government. Their choice of the former king was

a compact between him and them, by which the legislative power was entrusted with him, to be exercised for the general utility, and for the security of the rights of the society, and of its several members. But upon his demise, there is but one party in the compact remaining, and this party is the collective body of the people. They are therefore released from their obligation to continue under such a form of government, as they had once introduced, and may either renew that form, or introduce any other, as they, at that time, shall judge to be most convenient. It will be otherwise, if any part of the legislative body remains, during the interreign. If there is for instance then in being a standing body of nobility, who are at all times a part and only a part of the legislative body ; such a body of nobles has no constitutional right to act independently of the collective body of the people in any instance, without a king at their head ; they cannot therefore consistently with the compact, which settled the constitution, make any change in that constitution. And as the same compact binds the collective body of the people to them, this collective body cannot, consistently with such compact, introduce any change in the constitution without their concurrence.

It will be nothing to the purpose to urge here in general, that the laws of every society are sufficient to continue the constitution, to lay the collective body of the people under an obligation of renewing their representatives in democratical states, or of appointing a new king in elective monarchies ; even though during the interreign, there is no legislative body, or no part of a legislative body, in being, besides the collective body of the people. For certainly, if the society continues during the interreign, there must, even in that interval of time be a legislative power in existence : and

as there is then no particular legislative body, such legislative power must be vested in the collective body ; The consequence is, that, during this interval, the collective body may make or alter laws, as they please, by their general consent. And if they then agree to introduce a new constitution of government, such an agreement effectually repeals all those laws, by which the old constitution is supposed to have been established.

The constitution of civil government in a nation may indeed be said to be settled by law ; and perhaps the word may be a more proper one than the word compact, But then if we trace such constitution up to its first source, we shall find, that the law which settles it, must be ultimately derived from the joint consent of the society, that is, from the legislative power, not of any particular legislative body within that society, but of the whole collective body. The particular form of government in any society consists in the particular sort of legislative body, by which that society is governed, or in the particular sort of body, to which the legislative power of the collective body is given. To say therefore, that the form of government is settled or determined by any law, which is made by any particular legislative body of a society, different from the collective body, is the same in effect as to say, that the legislative body makes a law, by which it gives itself legislative power, or that it makes a law, before it has any power to make one. If we apply this to monarchical governments, we shall readily see the absurdity of it, one single person in a civil society makes a law, by which he gives himself legislative power. But how can this law be binding upon the society, if he had not legislative power, when he made it ? He must have derived his legislative power from some law, which was not of his own making, or else he could have no right at all to



make this any more than any other law. Can we say in aristocratical governments, that the select few, who are but a part of the society, have a legislative power over the whole in virtue of a law, which they themselves established? If we should say any thing in defence of their right to any legislative power, we must go up to a higher source of law, to a legislative power vested originally in the collective body of the society, which settled in this particular legislative body, all the power that they have of making laws, so as to bind the whole. In like manner we may ask, in democratical states, where the legislative body consists of representatives, or where it consists of any thing less, than the whole collective body; by what law was this form of government settled? Certainly it could not be settled by any law, which was made by such legislative body: because the law, that we are enquiring after, must have been made, before they were a legislative body: it being a law, which established them into such a body, or which gave them a legislative power over the whole community.

Upon the whole; as the law, which determines the civil constitution, is derived from the original legislative power of the whole society; so no constitution, though it has been once determined, can be any otherwise fixed and permanent, than by such a provision, as will prevent the legislative power from returning again to the collective body: because if it ever does so return, the same legislative power, which determined the constitution at first, may either continue it or new-model it at pleasure. And such a provision is made in fact, where, by the original constitution, the legislative body, or some essential part of it, is continued always in being. We have already seen, that this may be done in mixed forms of government; and that for want of it even democratical governments and elective monarchies may be precarious constitutions.

But though such constitutions of government, as have provided a standing legislative body, either in whole or in part, are here called fixed or permanent ones; yet it is not necessary, that they should continue for ever, or should be unalterably the same, as long as the society continues. They are called fixed or permanent constitutions; only because they are not variable in their own nature. But yet we shall find in some of our future enquiries, that there are many ways, in which even such civil constitutions, as these, are subject to alterations.

What I have now called a law is what I before called a compact subsequent, in the order of our conceptions, to the compact, which unites the several members of a civil society into one body. For the first agreement or consent of a number of individuals to unite together and form one body politic, though it produces a legislative power, does not vest such power in any particular part of the body, but in the whole. It does not give a legislative power to any single person, as in monarchies; or to a few select persons, as in aristocracies; or to representatives chosen by the people, or indeed to any part of the people exclusive of the rest, as is commonly the case in what are called democracies. The original legislative power of the whole society cannot be vested in any particular legislative body, within that society, any otherwise, than by means of a law, which is the effect of that original legislative power: and, as we shall see hereafter, such a law is followed by an agreement or compact between the collective and the legislative body. When the society has agreed to vest its legislative power in a certain person or in a certain number of persons; this person or these persons, so appointed, become the legislative body of that society, in consequence of their acceptance of this power and of their agreement to exercise it in a body of such a form, as is then settled.

Executive  
body how  
formed.

VI. Though we principally regard the nature or form of that body, in which the legislative power in any nation is vested, when we denominate the constitution of government in that nation, monarchical, or aristocratical, or democratical, or mixed; yet in order to form a full and distinct notion of such constitution, we must consider in what sort of a body the executive power is vested. This, which is the power of exerting the joint strength of the society, is originally vested in the whole collective body. If we look no farther, than the first compact, which united the several individual members into one society; though an executive power would arise out of such a compact, yet this power could not, by this compact alone, be lodged any where else than in the the collective body of the society. The public will is the active principle, which puts the public force in motion: and if nothing has passed between the several individuals, which compose it, besides the general agreement of uniting themselves into a civil society; the public will of such a society is naturally the joint will of the whole.

If the executive power is lodged any where else; if the will of any one person, or of any number of persons, less than the majority, puts the public strength in motion, and is understood to have a right of acting with this public strength; such right must be founded in some farther agreement, compact, or law, and could not naturally arise out of that compact or agreement, which merely produced the society by uniting the several members of it into one body. Every individual in the liberty of nature has a right to exert his own strength for his own defence and security: but each by becoming a member of civil society acquires a farther right of acting with the common force of such society for these purposes: and in order to acquire this right, he consents to use his own force no otherwise, than as a



part of the public or common force. In this situation, as long as nothing else has passed, his will has as much influence in actuating the common force, or putting it in motion, as the will of any other individual, who is a member of the same society with himself. This force does not indeed immediately operate upon his authority, or by the direction of his will; but then he had as much authority, his will has as much influence in exciting its operations, as the authority or the will of any one else has. As there is a natural equality amongst mankind, before they unite in civil society, so there is a social equality amongst them, after they are united: the mere act of thus uniting does not give any one particular person, or any number of particular persons, authority over the rest. This act binds each individual to submit himself, in judging of his duty, to such rules, as the common understanding prescribes, and to conform his will, in using any force for his own defence or security, to the common will of the society. But the same act, which binds him to this, gives him a right to have his understanding considered as a part of the common understanding; that is, it gives him an equal right with any of his fellow-citizens to deliberate and determine concerning the rules of duty; and it gives him likewise a right to have his will considered as a part of the common will, that is, it gives him an equal right with any of his fellow-citizens to excite the public force or to put it in action. The consequence of this is, that an executive body in a civil society, if it is not the whole collective body of such society, can be no otherwise naturally formed, than the legislative body is: as some compact, agreement, or law, besides that, which binds the society together, is necessary to give any particular person or persons the authority of prescribing rules of duty to the rest, or to establish a legislative

body; so a like compact, agreement, or law is necessary to give any particular person or persons the authority of acting with the public force, exclusive of the rest, or to establish an executive body. By the mere consent to unite and form a civil society a legislative power and an executive power are produced: but if no other act has passed within the society, which is so formed, the collective body is the natural seat of both these powers. Whenever therefore we find either a legislative body or an executive body distinct from the collective body; such legislative or such executive body must have been created by some farther act of consent: they are formed by some farther compact between the collective body, in which these powers were originally vested on the one hand; and the legislative or executive body, in which the constitution vests them, on the other hand.

Despotic  
constitu-  
tion how  
produced

VII. Though we here consider the legislative and executive bodies as distinguished from one another, by being employed about different objects, or in different provinces; yet it is not necessary, that these bodies should be different from one another in fact. Whatever prudential reasons there may be; there does not appear to be any reason in the nature of the thing, against supposing, that both these powers may possibly be vested in the same person or in the same body. Where the compact, by which these powers are conveyed, has established both of them in the same person or in the same body, whether that body consists of one person or of more, the constitution is called despotic. If they are both vested in one man, it is an absolute or despotic monarchy: if in a select body of nobility, it is a despotic aristocracy; if in the representatives of the people, or in any part of them, which is not a majority of the whole acting by joint consent, it may properly enough be called a despotic democracy; and lastly, if

they are both vested in a body compounded of any two or all of these parts, the constitution, though a mixed one, will still be a despotic one. In all these cases the same body, which prescribes what is to be done, having the public force in its hands to compel the execution of it, is subject to no constitutional checks or controls: it is possessed of the whole power of government, and consequently is as absolute, as it is possible for civil power to be. I say, as it is possible for civil power to be; because civil power, when it is vested any where, unless in the collective body of the society, however absolute it may be in some respects, is not so in all: we call it absolute, where the constitution has provided no constant and uniform control of it; that is, we call it absolute, when it is so in respect of any constitutional restraint. But still, as it is only civil power it will be limited by its own nature: for as this is a power formed for certain purposes, it cannot in its own nature be so far absolute, as to be free either to promote those purposes or to prevent them. What means of redress are to be used, when despotic governours, be they monarchical, aristocratical, democratical, or mixed, act contrary to the nature of that power, with which the constitution has entrusted them, will appear in some of our following enquiries.

VIII. The executive power continues, where the first agreement of the individuals to unite into a civil society naturally placed it, in the collective body of the society; if the magistrates, who put the public force in motion or act with that force, are appointed by the people, and continue, whilst in office, so far accountable to their constituents, that the people in their collective body are at the last resort; that is, if in judicial matters an appeal lies to the people against the sentence of any magistrate, and in matters of war or peace, conventions or alliance, nothing can be finally determined with-

Executive  
body how  
fixed.



out the concurrence of the collective body. But though the magistrates are originally appointed by the people in their collective capacity, and though this appointment is only temporary, so that at the expiration of the term, for which their office was given them, the executive power will again revert to such collective body; yet if, in the mean time, what those magistrates do is final, and no appeal lies from them to the people, the executive power is vested in their hands.

Such an executive body will indeed be of short continuance in itself; and the constitution will in this respect be liable to frequent changes: because upon every expiration of the term, for which the magistrates were appointed, the executive power reverts to the people, in whom it was originally vested: and they are then as much at liberty, as they were from the beginning, either to exercise it for the future in their collective capacity, or to dispose of it in the same manner, that they did before, or in any other manner, that shall then appear to them to be more convenient. If, instead of appointing a number of magistrates, they have appointed only one, and have left the appointment of the rest to him; he cannot be considered as the executive body, if the public force of the society, cannot upon all occasions be exerted by his sole authority without the express concurrence of his constituents. When such a magistrate is appointed, as acts independently of the collective body of the people, and is commissioned by them to exercise the public force by his own authority, without their express concurrence; he then becomes the executive body of that society. But if he has this power only for a term of years, or if this power lasts even for his life, but no standing provision is made to continue the like magistrate, either by making the office hereditary in his family, or otherwise; the

constitution will be only temporary. At his death, or at the expiration of his term, the executive power reverts as before ; and the people being bound by no law or no compact to go on in the same manner, may either renew the same or introduce a different sort of executive body, as they shall judge most convenient. Where the executive body, after it is once appointed, continues always in being, as it does, either if it consists of a number of persons, some of which remain though others die, or go out of office, or if it consists of only one person, and is made hereditary, so that upon his demise his heir succeeds immediately into his right ; there is then a perpetual obligation arising from the compact, by which such executive body was formed : because there is then a party always in existence, to whom the collective body of the people are bound by that compact. The constitution is by this means as fully established, as the nature of the thing can admit of. It may indeed be changed, but it is not variable in itself : such a consent, as introduced it at first, may alter it afterwards ; or as it is founded in compact, a breach of that compact on the part of the executive body will give the collective body if not a constitutional, yet certainly a natural right to alter it.

IX. The point, in which each particular person seems to be most interested, is to be able to judge what is the particular form of government in the nation, to which he belongs. For, as he owes obedience to the sovereign power, he cannot either know to whom his obedience is due or settle the proper measures of it ; till he has first informed himself to what person or persons the society has entrusted this power. But as the forms of government, which may possibly be established are very various, there does not seem to be any way of determining what form has been established in any particular nation, but by acquainting ourselves with the

National  
constitution a  
question  
of fact.

history and the customs of that nation. A knowledge of its present customs will inform us what constitution of government obtains now ; and a knowledge of its history will inform us by what means this constitution was introduced or established. This seems to be self-evident upon the principles already laid down.

The sovereign power, both in its legislative and in its executive part, is originally seated in what <sup>b</sup> Grotius calls the general subject of such power, that is, in the society itself considered as one collective body. If therefore there is, within the society, what he farther calls a particular subject of such power, that is, if there is any legislative or executive body, which does not take in the whole collective body ; this legislative and this executive body must have been established either by express or by tacit compact : and the terms or conditions of such compact cannot be found any where else but in the history, records, or standing customs of the nation.

Some indeed, who are better pleased with amusing themselves in speculations, than with enquiring into facts, have endeavoured to settle our notions of civil constitutions by abstract reasonings : as if such reasonings alone would be sufficient to teach us universally, what form of government is established in all countries, without attending to the history or customs of any. As this method favours the idleness of superficial politicians it is no wonder, that these abstracted philosophers should have many followers. Most men are willing to be thought very knowing in all questions, which relate to the constitution of civil government in their own country and few are willing to take so much pains, as is necessary to give them a tolerable insight into such questions. It would be a great expence of time and labour to read history, to collect and consider usages or customs, to search records, to examine and compare



facts. But such abstract arguments are easily invented, as will serve to puzzle both the inventor and his disciples, though they should neither be convincing to himself, nor to any one else. This seems to be the reason, why most of those, who write or talk about the constitution of civil government in our own or in any other country, should deal more in metaphysical reasonings, than in arguments drawn from facts and observation, and should choose to learn their political principles, rather from the subtilties of schoolmen, than from records and history.

Sometimes we are told on the one hand, that monarchy is the best form of government, that it must be a natural form, because the providential government of the world is of this sort, and that, as it arises necessarily out of parental authority, no other form can possibly be established of right, whatever may have been done in fact. On the other hand we are told, that supreme civil power is naturally and unalienably in the collective body of the people; and that consequently all establishments, which suppose a supreme power any where else, must be mere usurpations.

X. What is generally urged to prove, that monarchical constitutions are the only natural forms of government, is scarce worth examining. <sup>1</sup> We have already seen at large, how little reason there is for imagining that monarchical power arises naturally out of parental authority; or at least for imagining, that it should so arise without the aid of compact. And if children, after they are come to years of discretion, are not subject to any civil power of their father, till they have consented to it; they might naturally have withholden their consent, so as to continue in that freedom and independency, to which they were born; or might, by giving a like consent elsewhere, have established any other civil government, either of the same form with

Monarchical constitutions not more natural than others.

<sup>1</sup> See B. II. C. II. § IV.

what would have arisen in their own family, if they had agreed to remain under the civil power of their father, or of any other form, which they like better.

Notwithstanding the providential government of the world may be called monarchical; this is no reason why mankind should be bound to establish the same form in civil societies. Nor is it even an inducement to copy this form, till human monarchs can be shewn to have the same knowledge, to contrive for the benefit of their subjects, and the same goodness, to dispose them invariably to pursue this benefit, that God has to contrive for and to pursue the benefit of all his creatures.

As to the superior advantages of monarchical government above any other form, it must at least be allowed, that they are very far from being self-evident: and consequently, even supposing them to be greater than they really are, it is very possible for a nation, in establishing its civil constitution, not to be aware of them. And since the collective body of the people is originally at liberty to introduce what form they please, it is possible for them to make choice of another. However, all these supposed advantages would be found, upon enquiry, to be at least balanced, or rather to be outweighed by any inconveniencies, which would probably determine any nation, to choose another sort of constitution: if they were not misled for want of proper deliberation, or were not driven by distress to fix upon what in better circumstances they would not have chosen.

Politicians are however very well employed in comparing and balancing the advantages and inconveniences of each form of government with one another. For though the result of their enquiries will never determine what form it is, which any peculiar nation has agreed to establish, yet it may serve to shew every nation what is the most desirable form, and may lead

them, as they have opportunity, to make such alterations in their own, as will bring them nearer to that point, if they cannot quite reach it. Certainly our English poet has but little reason on his side, when he represents such an enquiry, as the business of fools, and maintains, that the only difference between civil constitutions of government consists in the better or worse administration of them: for that constitution is in his judgment to be called the best, let it be what it will, which is best administered. Whatever public benefit depends upon the character of the persons in power, it is derived from their wisdom and goodness, and not from the nature of the form of government. So that to call that form the best, which is best administered, seems to be speaking improperly. Or if we will call it the best, we must in the mean time allow, that it is the best by accident only, and not in its own nature. In the common course of human affairs it is almost impossible to prevent the civil power from coming into the hands of weak and bad men, whatever the constitution is. That form of government therefore is best in itself, which guards most effectually against this evil, or if this evil ever does happen, which lays the persons in power under such checks and restraints, as are most likely to prevent them from abusing their trust, or lastly if this trust is abused, which has provided the readiest means for correcting the abuses. An absolute monarchy is a constitution, which has so little title to these characters, that it can have no pretension to be thought the only natural, and much less the only possible, form of government, upon account of its being the best form.

XI. But yet it does not appear on the other hand, as Mr. Lock<sup>n</sup> maintains, “that a monarchical government is inconsistent with civil society, and so can be no form of civil government at all. The end of

Monarchical constitutions not impossible.

<sup>n</sup> Pope. Essay on man. Ep. II. lin. 305. 306.

<sup>n</sup> Lock's Works. V. II. p. 198.



civil society being, he says, to avoid and remedy those inconveniences of the state of nature, which necessarily follow from every mans being judge in his own case, by setting up a known authority, to which every one of that society may appeal, upon any injury received, or controversy that may arise, and which every one of that society ought to obey; wherever any persons are, who have not such an authority to appeal to, for the decision of any difference between them, there those persons are still in a state of nature. And so is every absolute prince in respect of those, who are under his dominion. For he being supposed to have all, both legislative and executive power in himself alone, there is no judge to be found, no appeal lies open to any one, who may fairly and indifferently, and with authority decide, and from whose decision relief and redress may be expected, of any injury or inconvenience, that may be suffered from the prince or by his order: so that such a man however entitled, czar, or grand signior, or how you please, is as much in the state of nature with all under his dominion, as he is with the rest of mankind. For wherever any two men are, who have no standing rule, and common judge to appeal to on earth, for the determination of controversies of right betwixt them, they are still in a state of nature.

Though we should not be able to shew, why this reasoning is inconclusive, yet we may be sure, that it is so, if it proves too much; that is, if it proves some proposition to be false, which we are sure is true. Now the same argument, which he here urges to prove, that absolute monarchy is inconsistent with the nature of civil government, and consequently that it cannot possibly be a form of civil government, will equally prove, that any other form of government is likewise inconsistent with civil society, and consequently that there can be no such thing as any form of civil government.

Lét us try this argument in another instance. Wherever any persons are, who have no authority to appeal to for the redress of any injury, which is received, or for the decision of any controversy, which may arise between them; there those persons are still in a state of nature. And so is every legislative body in respect of those, who are under its dominion. For this body being supposed to have all the legislative power in itself alone, there is no judge to be found, no appeal lies open to any one, who may fairly and indifferently, and with authority decide, and from whose decision relief and redress may be expected, of any injury or inconvenience, that may be suffered from such legislative body, or by its order: so that such a body, if it does not consist of the whole society, however it may be entitled, senate, or assembly of estates; or how you please, is as much in the state of nature with all under its authority or dominion, as it is with the rest of mankind.

It will scarce be replied here, that we have not supposed the executive power to be vested with the legislative power in this body, as they are both vested in an absolute monarch: because Mr. Lock would scarce allow the executive body, if it is distinct from the legislative, to be an authorized judge for deciding any controversy between the legislative body and the rest of the society, from whose decision relief and redress may be expected of any injury or inconvenience, that may be suffered by any person in the society from such legislative body. And if the executive body is not such an authorized judge; there will not, in point of wanting an authorized judge, appear to be any difference between the situation of an absolute prince in respect of his subjects, and the situation of a legislative body in respect of the rest of the society. To suppose the executive body to be such an authorized judge, is to sup-

pose its power to be superior to that of the legislative body; since giving the former such an authority as this, would be giving it authority to set aside the acts of the latter. Nay the executive body is so far from being a judge with authority to relieve and redress any inconvenience, that may be suffered by any person within the society from the acts of the legislative body; that if it is vested with no power, but what its name imports, that is, with none but executive power, it is not so much as a check upon the legislative body. For as the legislative power is the supreme power, so the executive body, if it is possessed of no other power, than what is merely executive, is naturally ministerial to the legislative. And it will be very difficult to find any difference between a prince, who has all, both legislative and executive power, in himself alone, and a legislative body, which has in itself alone all legislative power, and to which the executive body with all executive power is wholly ministerial. To make the executive body a check upon the legislative, we must suppose it to be possessed of some prerogative and to be such a necessary part of the legislative, that nothing can be done by the legislative body without the consent of the executive. Yet even in such a constitution as this, it will scarce be maintained that the executive body is an authorized judge to give relief and redress of any injury or inconvenience, that any person may suffer from the legislative or by its order.

It may indeed be said, that such a legislative, especially if representatives chosen from time to time by the people are a constituent part of it, can do no injury; because what is done by their authority is properly the act of the people, whom they represent. But neither will this make any difference between the two cases. For in whatever sense such a legislative body is said to



be incapable of doing any injury, an absolute monarch may be said likewise to be incapable of doing any. As the representatives of the people are commissioned to act for the people; so an absolute monarch, as his authority is originally derived from the same source, is likewise commissioned to act for them. And consequently, if it is supposed impossible for the people to be injured by what their representatives do, it will for the same reason be impossible for them to be injured by what an absolute monarch does; because both the representatives and the monarch are commissioned by the original consent of the people to act for them; so that the peoples consent is as much implied in what one of them does, as in what the others do. As a civil society has the common good of the public in view, so the natural end of that legislative power, which arises from civil union, is the common good. The power therefore, which is committed to a legislative body, being the legislative power of the society, is in its own nature limited to this purpose: as the society had no other legislative power to give, so the legislative body can have no other vested in it. Whilst therefore it continues to use the power, which was given it by the consent of the society, it can do no injury. But the question is, whether, if it acts for any other purpose, it is impossible for it to injure the society? and if it does so injure the society, the next question will be, who is the common judge between such legislative body, and the body of the society?

Mr. Lock has shewn us, that these questions may be applied with as much propriety to a mixed legislative body, as to an absolute monarch. ° “ Governments, he says, are dissolved, when the legislative body acts contrary to its trust. He puts the case of a legislative body con-

• Lock *ibid.* p. 237.

sisting of three distinct parts. First a single hereditary person having the constant supreme executive power, and with it the power of convoking and dissolving the other two, within certain periods of time. Secondly, an assembly of hereditary nobility. And thirdly, an assembly of representatives chosen from time to time by the people. As any other sort of legislative body, so such an one as this, acts, he says, against the trust reposed in them, when they endeavour to invade the property of the subjects, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people. For since it can never be supposed to be the will of the society, that the legislative body should have a power to destroy that, which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God has provided for all men against force and violence". Who then are the common judges between the legislative body and the collective body of the society, when the former thus injures the latter? Shall we say, that, as long as the legislative body discharges its trust, there is no occasion for such a common judge. and that, when it abuses its trust, the government is dissolved. May not we therefore say the same, where a single hereditary person is the legislative body? As long as he discharges his trust, there is no occasion for any common judge between him and the body of the society, and when he abuses his trust, the government is dissolved. The people do not feel the

want of a common judge, either where the legislative body is simple, or where it is mixed ; till the trust committed to such body is abused. But if we consider, as Mr. Lock does here, what the situation of the people is, in respect of their legislators of either sort, when there is a notorious abuse of this trust, we shall find, that there is in fact no more a common judge in one constitution of government, than there is in the other. The consequence of which will be ; that if absolute monarchy is an impossible form of government, because it is inconsistent with the nature of civil society ; a mixed legislative, or any other legislative will be an impossible form of government, for the same reason.

The institution of a legislative, Mr. Lock says, is an umpirage provided by the members of the same society for the ending all differences, that may arise amongst them, and is a bar to the state of war. He does not tell us, whether he means here the institution of a legislative power, or the institution of a legislative body. If by legislative he means a legislative body it is not necessarily true, that where no legislative has been instituted, different from the collective body of the society, there is no standing umpirage, which may decide all controversies, and be a bar to the state of war, amongst the members of the same society. Civil union naturally creates a legislative power ; which is originally vested in the whole body of the community. But whilst it resides there, it is as natural a bar to the state of war, as if it was vested in a particular part of the society, or in a legislative body, either simple or mixed. Such a body, upon the institution of it, may be considered as having the standing umpirage, which bars the state of war. But between whom has it this umpirage ? Between the several members of the collective body ; and not between itself and this collective body.



If then in a mixed constitution, we may say, that by the standing umpirage of the legislative body there is a bar to the state of war; we may say the same in a monarchy. Or if in a monarchy, the legislative body and the people must be considered as in a state of nature with one another, for want of a standing umpirage between such legislative and the people; we must for the same reason consider a mixed legislative and the people as in a state of nature; since there does not appear to be any standing umpirage between them. This reasoning is equally applicable to all forms of government, except such a perfect democracy, as we scarce any where find to have been established.

It may perhaps be urged, that a mixed legislative body is not likely to abuse its trust; especially where an essential part of it consists of persons, who are chosen from time to time by the people, and who are at all times so far considered as a part of the people as to be subject to all laws made by their own concurrence, and to the same laws, that the rest of the people are subject to. This is undoubtedly true: and the necessary consequence is, that such a mixed constitution is vastly preferable to a monarchy. But this consequence does not affect the point in question. We are not endeavouring to prove, that a monarchy is as good a constitution of government, as any other, but only that it is as possible as any other; not that it is as unlikely to be abused, but that it is as consistent with the nature of society, as any other. And the great use to be made of this point, when it is established, is to shew, that the abstract argument, by which Mr. Lock endeavours to prove, that no government can be monarchical, will be of little service to those lazy politicians, who think they have sufficient grounds to conclude the civil constitution of their

own country to be popular, from general reasonings upon the nature of civil government, without having recourse to records and history, to custom and usage; without looking back to the manner, in which their civil constitution was begun at first, and to the changes, which it has since undergone.

But after it has been thus shewn, that Mr. Locks reasoning is inconclusive, it may still be asked, why is it inconclusive? We say, that the want of a common judge between the body of the society and its monarch can be no reason for concluding, that these two parties are necessarily in a state of nature; because there is the same want of a common judge between the government and the body of the society in all constitutions whatsoever, except such, if there be any such, as are perfectly democratical: so that if we were to admit the truth of this principle, we should be led to conclude from it, that in all other constitutions whatsoever, the constitutional governours and the rest of the society are in a state of nature. Either therefore it must be allowed, that this principle is a false one, or else it must be maintained, that all constitutions of government are alike inconsistent with the nature of society. But though we are sure, that no principle can be true, if it necessarily leads to a consequence, which is confessedly false; yet still it may not be thought enough to prove in this manner, that it is not true, unless we can shew why it is not: that is, unless we can shew, how two parties can possibly be considered as not in a state of nature, though they have no common judge to decide in disputes between them.

Now it is certain: that persons in a state of nature have no standing judge of controversies, who can decide between them with authority: but till it is shewn, that the having such a judge is the only effect

of society, the converse will not be as certain; it will not be certain, that where there are two or more persons without any judge, who can so decide, those persons must be in a state of nature. Indeed in civil societies all individuals, in matters of private right or obligation, have a standing judge, vested with authority to decide finally: and this judge is the legislative body, or <sup>p</sup> rather the executive body acting under the checks and controls of the legislative. But then the existence of such a judge in some instances necessarily implies, that there can be no such judge in other instances. For no decision can be final; unless the contending parties chuse to acquiesce in it, where there is a farther judge to appeal to. If therefore there is a standing judge, whose sentence is final; the existence of such an authority necessarily implies, that there can be no farther appeal, or that there is no standing judge, between this final one and the parties in controversy. A state of society however, though in controversies between the legislative body and the community there is no standing judge, may easily be distinguished from a state of nature. The very existence of such an authority, as is lodged with the legislative body, is sufficient to make the distinction: because in a state of nature there is no such authority. Thus much indeed must be allowed, that, when there is occasion for a common judge between these two parties, between the legislative body and the rest of the society; that is, where the former have usurped a power, which does not belong to them; these two parties are then so far reduced to a state of nature, that they will have no means of deciding the controversy between them, but that force or strength, which nature has given them. But when this happens the constitution of government does not subsist, but is dissolved.



Upon the whole; the reason, why a monarch and the collective body of the society, are not in a state of nature, is because this body has entrusted him with such an authority over it, as the state of nature knows nothing of. His authority indeed is not an arbitrary one of doing what he pleases with the people, that he governs: though there are no constitutional checks and controls provided for his restraint, the authority entrusted with him is a limited one in its own nature, as being intended for the security and advancement of the common benefit. He and the society will indeed be in a state of nature, when he abuses this trust. But this instead of proving, that a monarchical constitution necessarily places the monarch and his people in a state of nature, will only prove, that they come into such a state, when the constitution is dissolved.

XII. What I have here principally in view is to convince the reader, that the only reasonable method of learning what is the constitution of government in any nation, is to read the history of that nation, and to collect from its most authentic records such facts, as relate to the forming the constitution, as far back as we can go, and such likewise, as relate to any sudden, or to any gradual changes, which have from time to time been made in it. I have with this view examined already some of the abstracted arguments, by which it has been attempted to prove on the one hand, that all constitutions, except such as are monarchical, are unnatural, and on the other hand, that a monarchic al constitution is inconsistent with the nature of civil society.

All constitutions not necessarily democratical.

We may now go on to consider and explain what Grotius says upon this subject; and perhaps, when his opinion is thoroughly examined and placed in a true light, it may be found less exceptionable, than at first sight it appears to be. Grotius maintains it to be

a false and dangerous opinion, that in all civil societies, without exception, the sovereign power is vested in the people, so as to make them the constitutional judges, whether their kings or other governours abuse their authority, and to give them a constitutional right of restraining or punishing those governours, where they are chargeable with such abuse. His commentator here accuses him of stating the question in a false and insidious manner. No one, says Gronovius, ever thought, that the supreme power is, every where and without exception, lodged in the hands of the people, so as to give them a right to restrain and punish their kings, whenever they misuse their power; or if any one ever has thought so, we can by no means agree with him. Thus far therefore the commentator and the author seem to be of the same opinion. But Gronovius goes on to inform us, that this is not the point in question. The true state of the question is, whether a people that have a government lawfully established, whether a people, that have once agreed to be governed by a king, or by a senate of nobles, or by an assembly of the estates, may not change the government, and even punish their governours, when the greater part of the society perceive such established government to be destructive of the common good, when their king is plainly become a single tyrant; or their senate of nobles is degenerated into a body of tyrants; or their assembly of estates is changed into a confused meeting of seditious factions. This indeed, which Gronovius proposes, is one question: but he had no reason for charging Grotius with stating it insidiously; if it is not the question, which Grotius here designed to examine. It is one question, whether the collective body of the people have, every where and without exception, a constitutional right to restrain and punish their kings, or

their nobles, or their standing representatives, that is, whether all constitutions of government must necessarily be perfect democracies. And it is another question, whether the people, whatever form of government they may have consented to establish, have not a natural right to judge, when that constitution is broken; and when it is, to introduce, if they are able, a new form of government, to put the civil power under other regulations, and to restrain or punish those, who have abused it, if they shall attempt to establish their unconstitutional usurpations by force. If the latter question had been what Grotius here designed to examine, he might indeed justly be charged with stating it insidiously. But if he designed to examine the former, he seems to stand clear of this charge. And certainly his words plainly shew us, that he had the former of these two questions in his mind. Or if his words are not a sufficient evidence, we may have fuller evidence by attending to the arguments, which he tells us are made use of in defence of the opinion, which he rejects: for those arguments, if they prove any thing, would prove, that the collective body of the people have every where without exception a constitutional right of restraining and punishing the legislative body, and not that they have a natural right of doing themselves justice, where the civil constitution is dissolved by unconstitutional usurpations of power. There is still a farther evidence, that he had no thoughts of examining into the latter of these two questions in this place: for it is scarce likely, that he should undertake to examine it twice; and we find, that he does examine it in <sup>s</sup> another place.

What our author has said upon the point before him will be the more readily admitted; if we attend to his principles in their full extent. Though he explains

<sup>r</sup> Grot. *ibid.*

<sup>s</sup> Grot. L. I. C. IV. § VII.



himself. in the instance of monarchical government, his principles, he says, are intended to be general, so as to be applicable to the sovereign body, whatever the form of that body is; whether it consists of a single person, as in monarchies; or of a senate of nobles, as in aristocracies; or of any select part of the people, as in most democracies; or is compounded of all these, as in mixed constitutions. And if we suppose the sovereign body to consist of a single hereditary person having the constant supreme executive power, of an assembly of hereditary nobility, and of an assembly of representatives chosen from time to time by the people; it will scarce be thought an error in political principles to maintain, that the collective body of the people have not a constitutional right to restrain and punish such a body as this.

All that our author maintains more than this is, that monarchical government is possible, that it is possible for the collective body of the people to vest the supreme power both legislative and executive in the hands of one man. And even what he alledges in support of this opinion, has been the more blamed for want of considering, that his arguments upon this head are as applicable to all other forms of government, as they are to monarchical ones: since it will scarce be possible to shew, that the collective body of the people can vest such a power in any number of persons of what sort soever less than they majority, if they cannot vest it in a single person.

Our <sup>u</sup> author's topic, from which he sets out, when he is to prove, that the whole civil power, legislative and executive, may be entrusted with a single person, has been the ground of some exceptions to his whole opinion. The law of nature, he says, allows an individual to dispose of his own person, so as to make himself a slave and he appeals to the mosaic and to do the Roman law in

<sup>t</sup> Grot. L. I. C. III. § VIII.

<sup>u</sup> Grot. *ibid.*

support of this principle. From whence he argues that a number of individuals, though formed into a civil society, may, consistently with the law of nature, subject themselves in such a manner to the civil power of any one man, as to retain to themselves no part of that power either legislative or executive. The reader has already seen in one instance what abilities Gronovius was possessed of as a commentator; and his manner of treating this argument will give us another specimen of them. He first mistakes our authors meaning, and gives him a very exceptionable one, and then grants the whole argument to be conclusive in the mistaken and exceptionable sense, in which he understood it. Many who read Grotius, fall into the same mistake with him, as to the authors meaning: but then they are wise enough to see, that, if Grotius meant what they imagine him to mean, his argument would not be conclusive. He is generally supposed to reason in the following manner—Since the law of nature allows an individual, by his own act, to make a slave of himself or to subject himself to the private despotism of his master; the same law must necessarily allow a number of individuals, by their own act, to make slaves of themselves, or to subject themselves to the private despotism of their civil governour. Thus he is supposed to conclude from what may be done in one case, that the same may be done in the other. Whereas in fact his argument is such an one, as the logicians call *a majori ad minus*; he reasons from the possibility of doing more to the possibility of doing less. Since the law of nature allows an individual, by his own act, to part with so much of his liberty, or so much of his power over himself, as to become a slave; it cannot but allow a number of individuals to do what is less than this, to part with so much of their power over themselves in their social capacity, as to retain no con-

stitutional civil power. If the law of nature allows a man, by his own act, to subject himself to private despotism, by making himself a slave; it cannot but allow him, by his own act, to do less than this, to part with his liberty, in a less degree, and subject himself to civil despotism, by giving up all the share, which he had, as a member of civil society, in the legislative and executive power.

It may be necessary here just to mention the difference between slavery and civil subjection on the one hand, and between private and civil despotism on the other. The slave is bound to make the good of his master the end of all his actions, and consequently to conform himself in all things to the will of his master. The subject is bound to preserve and advance the good of the civil community, and consequently to conform himself to the will of such community, in all things, which relate to the general good. Private despotism therefore implies a right in the master to direct all the actions of the slave for his own benefit. Civil despotism implies a right in the civil governour to direct such actions of the subjects, as relate to the general good or benefit of the society. From hence we may understand, that our authors reasoning is conclusive, when it is considered, as he intended it, only as an argument *a majori ad minus*; from what is greater to what is less. If the act of an individual can bind him to submit all his actions to be directed by the will of his master, for the interest of his master; a like act can bind any one individual or any number of individuals to submit such of their actions, as are relative to the society, of which they are members, to be directed by the will of their civil governour, for the common interest of the public. Certainly, if mankind are incapable of laying themselves under such an obligation as this, there can be no such thing as an established form of government, unless it is



a perfect democracy: for this is the subjection, which the individuals, who are members of civil society owe to the legislative body; whether that body consists of one man, as in monarchies, or of a select body of hereditary nobility, as in aristocracies, or of any part of the people less than the majority of the whole society, as in all democracies, but those which are perfect ones; whether such part is considered as the representatives of the rest, or whether it is a part, which acts collectively instead of the whole. We may observe by the way, though it does not relate to our authors reasoning, that even private despotism is not such a sort of power, as it is commonly supposed to be. <sup>w</sup> It is not a right in the master to do what he pleases with the slave. It is naturally subject to several limitations; and as the slave is injured, when any of these limitations are broken, he has a right to seek for redress. A single slave indeed may be too weak to have the means of redress in his power: but a nation of slaves, if Grotius had supposed any such thing, would have strength enough to support their rights, if they were willing to use it. However Grotius does not suppose any such thing; but whilst he contends for the possibility of a peoples committing the whole civil power, both legislative and executive, to a part of the society, as for instance to a king in some constitutions, to the nobles, or to the assembly of the estates in others, he considers the power in the hand of this part, only as civil power, and not as private despotism; and he considers the people as in a state of civil subjection, and not as in a state of slavery. If he had not this distinction in his mind, his whole reasoning here would be inconsistent with the first principles, which he lays down <sup>x</sup> elsewhere, when he defines a nation to be an assembly of men of free condition, in opposition to a family of slaves. And whether this civil

<sup>w</sup> See B. I. C. XX. § V.

<sup>x</sup> L. I. C. I. § IX,

subjection is due to one man or to more, it is still but civil subjection: the power acquired by it is only civil power, that is, a power of directing and of compelling the subjects to promote the common good and benefit in all such actions, as relate to the peace and welfare of the society. This power is not tyrannical in itself and does not imply, that they, who are intrusted with it, have any right to compel the subjects to pursue any other end. If they should under the colour of this power pretend, that they have such a right, I do not find that our author maintains it to be unlawful for the people to make use of such means, as they can, to prevent themselves from being enslaved.

After Gronovius has supposed his author to be contending, that a number of individuals, uniting into a civil society, may, consistently with the law of nature; make themselves slaves to their governour, and has granted the whole force of the argument in this mistaken sense of it, which no one else, but himself would have granted, he asks, what is the farther consequence? and then amuses himself with contending, that, though such nations which have thus enslaved themselves, may be slaves, if they please; yet the consequence of this argument are not applicable to any nation in Europe. As if Grotius had here been endeavouring not only to prove that any subjects, considered as members of civil society, may be as much at the arbitrary disposal of their civil governours, as slaves are at the arbitrary disposal of their masters; but that some or all the nations in Europe have in fact thus enslaved themselves. As our author had no intention to prove in general, that subjects, as members of civil society, may be slaves, so he had much less any intention of proving this to be the case in fact of any nation whatsoever. The point, which he has in view, is only to shew that all constitutions of government are not, in the nature of the thing, purely

democratical ; that the collective body of the people, though the supreme legislative and executive powers begin from them, and they are originally vested in them may so far have parted with these powers, as not to have a constitutional right of deliberating upon what the legislative and executive bodies do, and of restraining or punishing the persons who compose these bodies. He instances, at first setting out, in the case of a monarchy, and endeavours to shew, that the constitutional legislative and executive powers may be given up by the people, and be entrusted by them to a single person : but he observes, before he concludes what he had to advance upon this subject, that he designed his reasoning should be general, and should be extended to all other forms of government whatsoever. Nor does he attempt to prove, even whilst he dwells upon the instances of monarchies, that any such constitution, as he there describes, is actually established in any country whatsoever. If such a constitution is possible in the nature of the thing, it is enough for his purpose. And his unthinking commentator, whilst he designed to oppose his principles, grants him not only this, but much more than this ; he grants, that the members of a civil community may by their own act make themselves slaves to their civil governours.

We may judge, how well this commentator was qualified to write upon civil power, if we attend to his manner of proving, what Grotius never denies that there is no kingdom in Europe, where the subjects are under the absolute power of a monarch. The Germans, says he, elect their emperor. The French originally chose their kings in the first establishment of the three lines of Meroveus, Charlemayne, and Hugh Capet. And the Spaniards received the house of Austria upon the title of marriage and compact. It is not worth the while to



enquire, how far, in the last of these instances, a claim to govern under the title of having married one, who had a right to govern, can without any intervening act of the people, be called a compact. But in general we may observe, that, if all, which he contended for here, is granted; if these several kingdoms were obtained by election or by compact; it will by no means follow, that the kings are not absolute: since upon our commentators principles, compact may not only give a king such an absolute civil power over his subjects, as shall be under no constitutional control, but may give him likewise even private despotism, so as to make them all slaves. And if we grant still farther, that none of these monarchs have absolute civil power, it will not follow, that Grotius is mistaken, when he maintains, that an absolute monarchy is a possible form of civil government.

Gronovius indeed asks, what occasion there is for concerning ourselves in Europe with such a question as this? But the answer is obvious. We have as much to do with this question in Europe, if we have a mind to understand the origin and nature of civil constitutions, and to settle the measures of that obedience, which we owe to our civil governours, as if we lived in Asia. For certainly the measures of constitutional obedience to our governours, be they monarchs, or nobles, or our own representatives with legislative authority, will not be the same, if the people in their collective body have not every where and without exception a constitutional power of restraining and punishing their governours, that they would be, if this collective body had such a constitutional power.

It was not material, whether our author examined this question in the instance of an absolute monarchy, or in the instance of any other form of a legislative body. Though perhaps what he says upon it would have been

less objected to, if he had made choice of some other instance: and he would, besides this, have had the farther advantage of not being led to explain the occasions of establishing absolute monarchies; upon which subject he has advanced some positions, that most of his readers are displeased with.

The point, which he wants to establish, when it is stripped of this circumstance, is, that, unless in perfectly democratical societies, there is in some one man, or in some body of men, within the society, a civil despotic power lodged, which though it is originally derived from the collective body of the people, is exercised afterwards so far independently of them, as not to be subject to any constitutional restraints from that body. Despotic power is a bad name indeed, because it is commonly used to convey the notion of what is arbitrary and tyrannical. But this bad meaning will be taken off, if we call it civil despotism, which is the civil power originally inherent in the community or collective body itself, but entrusted by their consent, either express or tacit, with the governing part of each community. What Grotius principally contends for is, that this power may be so delegated by the collective body, as to leave that collective body no share in it. When this has been done, the people he says, have no constitutional right to restrain or punish those governors, who are entrusted by them with this power. But then, where the constitution is broken, or where the constitutional governors pretend to and make use of a power, which does not belong to them, a power of causelessly and arbitrarily oppressing the people, which is no part of civil power; our author, as far as appears, does not contend, that in these circumstances the people have no natural right of doing themselves justice. And certainly we ought very carefully to distinguish between

a constitutional right in the people to interfere in the affairs of government, to direct or restrain the legislative and executive bodies in the exercise of the power, that is entrusted with such bodies, and a natural right in the people to maintain the constitution, as it was at first settled, when any attempts are made to alter it; to resume the legislative and executive power, when the constitution has been broken; or to defend themselves against all unfocial or unconstitutional oppression.

Grotius, as I observed before, having chosen to explain what he has to say upon this subject, in the instance of monarchy, was led to say something concerning the possibility of introducing such a form of government, not only in the nature of the thing itself, but in fact too. As the possibility, in the nature of the thing, of entrusting the whole civil power, both legislative and executive, in the hands of one man, so as not to subject him to any constitutional restraints from the collective body of the people; the general consideration, by which such a constitution of government is shewn to be consistent with the nature of civil society, is the same, that must be made use of to shew, that any other form of government is possible, that the legislative and executive power are subject to no constitutional restraints from the collective body of the people, when they are entrusted with any number of men, of any denomination whatsoever, less than the majority of the community. It might be objected indeed, that we cannot well presume, that any nation would ever consent to trust the whole civil power with any one man for reasons which have been taken notice of already.<sup>a</sup> But to this our author replies, that the objection is nothing to the purpose of the point in hand: for we are not enquiring, what form of government may be presumed to have been established, where the matter is

<sup>a</sup> Grot. L. I. C. III. § VIII.



doubtful ; but what form may be established consistently with the nature of civil society. You may urge, that this form is attended with many inconveniences : but all the inconveniences, which attend it, as they will never prove it to be impossible in fact, so much less will they prove it to be impossible in its own nature. All forms of government have some inconveniences attending them. And if the inconveniencies of one form would prove it to be impossible ; the inconveniencies of all other forms would prove them all to be impossible. As there are many ways of setting out in common life, many different trades, professions, or occupations for men to choose out of, and some are in themselves preferable to others : mankind, in determining what way of life they shall enter upon, do not always fix upon that way, which may appear most eligible in itself. Sometimes their situation will not allow them to engage in the profession, which they would otherwise have liked best. Sometimes they chuse wrongly for want of deliberating at all. And sometimes they are misled in their judgment, when they do deliberate. Just so it happens, where a nation is to chuse its form of government. Distress may compel it to take up with such a form, as in better circumstances it would not have chosen. It may sometimes establish a form of government too hastily without deliberating, which is best. And sometimes, even though it should deliberate, it may be mistaken in its choice. So that notwithstanding it is true, that absolute monarchy is not only attended with some inconveniences, as all other forms of government are, but that it is attended with more than any other ; yet this is no reason, why it should be impossible for such a form ever be to established in fact. The nation, where it is established, may have chosen this form, though they knew it was a bad one : or they may have

chosen it, because, either for want of consideration, or for want of reasoning upon right principles, they thought it to be a good one. In our endeavours therefore to find out whether it is this, or any other form, which has been established in any nation, we are not to consider the excellence or advantage of this or of that form, but to attend to the matter of fact, and to enquire what form appears to have been actually established by the consent of the people, either express or tacit. Grotius mentions particularly the motive of distress, when he supposes it possible for a nation to be in danger of being destroyed by war, if it does not put itself under the absolute command of some able and experienced leader, or to be in danger of perishing by want, if it does not give up its general right in the civil power to some person, who will supply its wants upon no other terms. He supposes farther, that an owner of large tracts of land may grant the land out to such persons, as are willing to settle there, upon condition of his having the constitutional power of governing all those persons, considered as united into a civil society; or that one, who has private despotic power over a great number of slaves, that is, of persons, who are bound to work solely for his benefit, may give them their personal liberty, so as to form them into a civil society upon condition, that they shall still be subject to his civil despotism, or be obliged to promote a common good in such a manner as he shall direct.

It is not worth our while to examine, how far these supposed cases may ever happen in fact. The great point, that we want to prove, is, that all governments are not necessarily democratical, and that among other forms of government, which are not so, and yet are possible in the nature of the thing, an absolute monarchy is one. And if it should be thought farther necessary to

shew, that such a form is possible in fact; the considerations already mentioned may be sufficient to shew it: I mean, that the distressful circumstances of a nation may compel the people to chuse this form; or they may chuse it capriciously without deliberating; or they may chuse it mistakenly even after they have deliberated.

What our author says, in regard to the possibility of establishing this or any other particular form of government by conquest, is more exceptionable. But I shall pass it over here; because we shall have an opportunity in another place of examining into this matter more at large.

However, before we leave this part of our present enquiry, it may not be amiss to remind the reader, that after this or any other sort of civil constitution is established, it is not necessary, that the same constitution should remain for ever. Since it is derived originally from a compact either express or tacit, between the legislative and executive bodies on the one hand, and the collective body of the people on the other; though both parties are bound by this original compact, as long as it subsists; yet we shall find hereafter, that its obligation may be dissolved, or that its conditions may be altered.

If we go on to examine the arguments, which Grotius says are commonly urged against his opinion, we shall perhaps be better informed what that opinion is, and shall see, that instead of enquiring here whether the people have a natural right to resist any unconstitutional oppression or injury arising from the legislative or the executive bodies, his design was to enquire, whither they have necessarily such a constitutional right of restraining or punishing these bodies, that no form of government can be consistent with the nature of civil society, which does not vest the sovereign power ultimately in the collective body of such society.



First it is alledged, in contradiction to our author's opinion, that the king, or the hereditary nobles, or the representatives of the people, are all or any of them originally appointed by the act of the people, and derive their power, whatever it is, from the joint consent of the civil society, over which they preside. But since in the very notion of an appointment to any office, the constituents are superiour to those, who are so appointed, the consequence will be, that in every civil society the people must naturally be the superiour party, or that the constitutional sovereign power is naturally lodged with them. In reply to this argument, Grotius indeed insinuates, that in some instances, particularly in that of conquest, the power of governing may possibly not arise from the appointment of the people. But as this part of his answer is not true, so neither is it what he lays the chief stress upon. He insists rather, that the principle upon which the argument proceeds, does not hold good universally, that a person who is appointed to an office, is not upon that account necessarily inferior to his constituents. Indeed where the appointment is precarious, where he holds his office, only at the will of his constituents, and may, by the particular nature of such appointment, be removed at their pleasure; he is at all times so dependent upon them, that the power, which they reserve to themselves, of displacing him, renders them in point of authority superiour to him. But where, though the appointment arose originally from their will, the effect of it is afterwards necessary; so that he is no longer dependent upon their will for his continuance in the office, which they at first gave him; his having been appointed by them does not imply, that they have any authority over him. If we therefore set out upon the principle, which Grotius seems to doubt of without any good reason; I mean, that the governours of a civil society derive their power

from the appointment of such society; yet it does not follow, that the constitutional power of the people is necessarily superior to that of the governing body, of what sort soever it is, merely upon account of their having been the original constituents of that body. In order to prove this, they, who urge the argument, instead of reasoning from the general nature of appointments to any office, should reason from the particular nature of an appointment to the office of civil government, and should shew, that such an appointment must always leave in the hands of them, who make it, a constitutional power of displacing their civil governours at pleasure. It is not sufficient to shew, that, where the constitution is broken, or where the governours are guilty of great and notorious oppression, the people have a natural right to redress themselves. This would only prove, that the people, as one of the parties in the compact, by which the constitution was established, are naturally obliged to nothing but what is contained in that compact: it would not prove, that they have by that compact a constitutional right to check and control their governours in the exercise of the power, which such compact lodged in their hands.

The principle, upon which the second argument, that Grotius examines, proceeds, is, that all government is intended for the benefit of those, who are governed, and not for the benefit of those, who do govern; and consequently, as civil government, according to this principle, is intended for the benefit of the people, they must necessarily be considered as the superior parties in the contract, which establishes the form of government: because we cannot imagine, that in any contract the chief regard would be had to the interest of any but the superiour party. Our author objects in the first place to the principle, upon which the argument proceeds: he does not allow it to be uni-

versally true, that all government is designed for the benefit of those, who are governed, rather than for the benefit of those, who do govern. For in his opinion the benefit of the party, who does govern, is in some instances the end of introducing the government. Thus the good of the master is the end or purpose of that authority, which he has over the slave: and though it may be possible, that the slave should be benefited by this authority; yet this benefit of his is accidental; it is not the end, which the authority of the master has in view. In other instances the mutual benefit of both parties is the proper end of government; particularly it is so in that authority, which a husband has over his wife. But Grotius was aware, that, if we make a very small alteration in the principle here laid down, so as to restrain it to civil government in particular, instead of extending it to government in general, these instances would be nothing to the purpose. If we say, that all civil government has the good of those, who are governed, and not of those, who do govern, for its principal end; the argument will stand clear of any exceptions, that may be drawn from these examples: it will then be nothing to the purpose to urge, that it is not so in other sorts of government, in that of a master, or in that of a husband.

Our author therefore goes on to offer his reasons, why this principle should not be looked upon as necessarily true even in civil government. Where civil power, he says, is acquired by conquest, the end, which the conqueror has in view, when he establishes himself in the possession of such power, is his own benefit. And yet such an establishment is not necessarily a tyranny: because there may possibly be no injustice, either in the establishment of this power, or in the exercise of it, after it is established: and the word tyranny, as it is



commonly used, includes the notion of injustice. We will not stop here to enquire, how far such a power may be established by conquest, nor how far it may be exercised without injustice ; for without entering into these questions at present, we may observe in reply to what our author here advances ; that, if he will not allow us on the one hand to call a power of governing, introduced with a view only to the governours benefit, by the name of tyranny ; we cannot allow him, on the other hand, to call it civil power. Where the benefit or interest of the governour is the chief end proposed ; so that they, who are under his authority, are obliged to direct their actions to the advancement of this end ; the power by whatever means acquired, or however lawful, is private despotism and not civil power. We might therefore, notwithstanding this instance, still maintain, that all civil government is introduced rather for the benefit of those, who are governed, than of those, who do govern.

This principle however, though Grotius has not disproved it, is not true in the manner, in which it is here expressed. Civil government, though it is intended for the good of those, who are governed, cannot be intended solely for their good : it is intended for the common interest of the whole society, both of those, who are governed, and of those, who do govern, and not for the separate interest of either exclusive or the other. Civil power, in the first original of it, results immediately from civil union. And this power, if it was to continue in the hands where it is first lodged, that is, in the collective body of the people, is undoubtedly designed to promote the same end with civil union, that is, the common benefit of the whole body politic, and of the several parts of that body. But when any civil society has gone far-

ther, when it has by a subsequent compact introduced some other form of government, which is not purely democratical, and has vested its civil power in the hands of some particular part of such society, as in a king, or in the body of the nobility, or in a body of representatives; these established legislators do not cease to be a part of the society: and consequently their benefit is as much in the view of civil power, as the benefit of any other persons, who belong to it. The original end of civil power is the common benefit of all: and the nature of it is not so altered by being committed to a select part of the body, as to confine the benefit designed by it, to those other parts, who have given up their share in it. The collective body of the people might perhaps be induced to commit the sovereign power to some particular legislative body in expectation, that it would be exercised more to their advantage, when so disposed of, than if they had retained it in their collective body. But they would have little reason to expect such advantage, if by this act they designed to separate their interest from the interest of the legislative body, considered as a part of the society, whether it consists of a king only, or of a number of hereditary nobility, or of representatives, who are chosen for a term of years, or of all these together. I say, considered as a part of the society; because though the end of civil society is the common benefit of all its parts, as much of the governing as of the governed part; yet when the governours set up a separate interest of their own, as if they were not parts of the society; neither the end of instituting a form of government, nor the end of uniting into a civil society, can bind the people to pursue this separate interest to the hurt of the public welfare.

Grotius however allows, that the good or welfare of those, who are governed, is principally regarded in most

instances ; when civil constitutions of government are established : but then he denies it to be a consequence of this principle, that the people are in every such establishment the constitutional superiours. The power of a guardian, as he observes, is given him for the benefit and interest of his ward. But no one can infer from thence, that the ward is superiour to the guardian. The very notion of a right in the guardian to direct the ward implies the guardian to be the superiour ; notwithstanding he is obliged by the nature of the compact, which gave him this right, to use it to the advantage of the ward, by directing him to his own good. But our author is aware, that his own instance of guardian and ward may be urged against himself. It may be said, that, as the guardian, if he abuses his trust, may be removed from it because he was appointed, and had this trust committed to him, for the benefit of his ward ; so likewise it seems reasonable that the governours of a society, of what sort soever they are, should be removed from their trust, when they abuse it. Our author replies here, that this may be the case of the guardian, because in the society, of which he is a member, he has a superiour : but in civil governours it cannot be the case ; because their cannot be an infinite progression of civil governours, one superiour to another, but must be somewhere a last resort, either in some one man, or in some body of men who have no superiour but God. This reply however does not clear up the matter ; it does not shew, that the constitutional governours have no constitutional superiour, and particularly, that the collective body of the people is not this superiour : since we may suppose this without being reduced to the necessity of supposing farther an infinite progression of civil governours one superiour to another. This collective body may be the last resort ; it may be this assembly, which has no superiour but God.



We shall be the better enabled to form a judgment upon the question now before us, If we attend to the distinction, already mentioned, between a constitutional superiority in the people, or a constitutional right in them to restrain or punish their established governours, and a natural right of defending themselves against any unsocial or unconstitutional injury or oppression brought upon them by such governours, under the pretence of exercising that civil power only, with which the people had entrusted them. No one will imagine, that upon every supposed mismanagement of the public affairs, or even upon such real mismanagement, as human nature exposes a man to in every station, the people have a right to dethrone their king, to degrade their nobles, to discharge their representative body, before the term, for which that body was chosen, is expired, and to take the civil power again into their own hands, to new model the constitution, or to continue the old form of government in a different set of men. Yet this must be the necessary effect of supposing a constitutional superiority in the collective body of the people, under any form of government either simple or mixed. The common benefit of the whole, which is the end of civil society, as well as of every sort of civil constitution, may indeed be a sufficient foundation of a natural right in the collective body to oppose unconstitutional oppression, or to release themselves from that compact, by which they committed the civil power to their established governours, when these governours have so far broken this compact on their side, as to make their continuance in power plainly and notoriously inconsistent with such common benefit. If this is all, that is meant by saying, that in monarchical constitutions the people are superior to their king, we may allow it. But we should observe at the same time, that this right is

called by an improper name : for instead of being a constitutional superiority, whilst the compact, which introduced and established the form of government subsists, it seems rather to be a natural equality, when that compact is broken.

Others, says our author, have supposed such a sort of mutual subjection between the king and the people, that the people are obliged to obey him, when he governs well, but that he, in his turn, becomes inferiour to them, when he governs otherwise. He is here speaking of monarchical constitutions in particular ; but what he says will be applicable to all other constitutions, if we only change the word king for the words constitutional governours. If they who maintain this opinion, only meant, that, where such governours command any unjust actions, the people are not bound to obey them ; he allows, that they would be in the right ; but he observes at the same time, that such a liberty in the people does not imply any civil or constitutional superiority in them. In some constitutions we find the sovereign power actually divided between the king and the people : but where such a division is designedly made, the most usual and the best method of making it is, to assign certain and determinate limits to their respective jurisdictions ; to give the king authority in some affairs, or over some parts of the territory, or over some certain persons ; and to give a like authority to the people in other affairs, over other parties of the territory, or over other persons. But the good or bad management of affairs in any instance, especially in matters of civil policy, is so problematical ; so much may be said in any instance in opposition to any particular measure or in defence of it ; that this can by no means be fixed, as the proper limit of the respective jurisdiction or constitutional superiority of the king and the people. Such

an uncertain limit, as this, would occasion endless confusion: it would be always impossible to know, which party was uppermost, and which party was vested with the sovereign power, whether the king or the people: one party having always an opportunity of pretending, that the measure in question was a good one; and the other having a like opportunity of pretending, that it was a bad one. But if so much confusion would follow from such a sort of mutual subjection as this; we can have no reason to imagine it to be of the essence of civil government, that there should be such a mutual subjection: because, as civil government was designed for the common peace and benefit of the society, nothing can be of the essence of it, which would necessarily introduce confusion. Thus our author reasons upon this point. But it will perhaps be made most intelligible, if we keep to our former distinction, and maintain, that the king, in a monarchical form of government, has the sovereign power granted to him by compact, which power makes him the constitutional superior of the people. But then, if he breaks this compact, there is no necessity, in order to support the right of the people, to maintain, that they become his constitutional superiors; it is sufficient, if such a breach of compact leaves them at liberty to redress themselves by such means, as they have in their power.

Titles or  
appearances  
do not  
determine  
the nature  
of the con-  
stitution.

XIII. What has been already said may be more than enough to shew, that whoever would form a true judgment concerning the constitution of civil government, in his own or in any other country, must consider it as a question of fact, and must make use of the helps of records and history instead of amusing himself with abstract reasonings. But it will be necessary even in using these helps to observe some cautions: because when the facts, by which he is to form his judgment, are before him, it is possible for him to form a wrong one.



<sup>2</sup> The first caution to be observed is, that, in judging what is the civil constitution in any country, we ought to be careful, that titles or appearances do not mislead us.

The titles of Emperor, or King, or Prince, or Duke, for instance, are commonly supposed to imply different degrees of civil power in the person, to whom such titles are respectively given. When we find, that the chief magistrate in any nation is called an Emperor or a King; we are apt to imagine, that sovereign power goes along with these titles, and consequently, that the constitution must necessarily be monarchical. On the other hand, if he is called a Prince or a Duke: these are looked upon as inferior titles: and if we were to attend to the title, rather than to the truth of the fact; the inference might perhaps be, that the chief magistrate, who has only one of these inferior titles, has not sovereign power, but that the constitution is either mixed or popular. But these titles, however they might be intended at first, are now used indiscriminately. The lowest of them is frequently given to persons, who have sovereign power, and the highest to persons, whose civil power within their own territories is not sovereign.

In like manner, where we find a senate or parliament, by which the people are represented; we are apt to conclude from such an appearance, that the people have at least a constitutional share in the sovereign power, if not the whole of it. Such a conclusion however is not always well grounded. Before we can determine, whether it is, or is not well grounded; we must attend, not only to the existence of such a body, but to the business, in which it is employed. It may be designed only to give the king an opportunity of knowing the state of the nation better, than he could have known it otherwise; to acquaint him with such public grievances, as he could not by any other means have been so

<sup>2</sup> Grot. *ibid.* § X.

well informed about ; or perhaps, by his own appointment, to register his acts in order to make them known to the people in the most ready and most authentic manner. If this is all, that they have to do ; they do not seem to have any civil power, except what he delegates to them. And the existence of such a body of men would be a very weak argument to prove, that the constitution is not absolutely monarchical. But if, on the other hand, their business, when they meet, is to raise money for the support of the government, to settle the uses, to which such money shall be applied, to exercise a part of the legislative power, by deliberating concerning the expediency of making any new laws, or of repealing any old ones, and to act with such authority in this point, that nothing, can be done effectually without their concurrence ; these are instances of sovereign power, and will at least prove the constitution to be a mixed one.

Tenure of civil power to be distinguished from the power itself.

XIV. <sup>a</sup> Secondly, the claim, which the king has to the civil power, that is, the tenure, by which he holds this power, or so much of it, as the constitution gives him, ought to be carefully distinguished from the power itself.

Other things are held or possessed by three sorts of tenure, that is, there are three sorts of claim, which the owner may have to them. A man may have full property in corporeal things, or he may have a claim of usufruct in them, or they may be his by a temporary tenure. Of these three sorts of tenure, that of full property is the highest in degree, and may therefore be called the supreme tenure. The other two, an usufructuary or a temporary tenure, are of an inferiour sort. In corporeal things, the claim of the owner, or the tenure, by which he holds them, is plainly different from the things themselves ; it is impossible to confound the field, which a man claims as his own, with the right,

<sup>a</sup> Grot. ib. § XI.

by which he claims, or the tenure, by which he holds it. The same field may at different times belong to one man in full property, to another by usufruct, and to a third for a term of years. But it is plain, that the field and the tenure, by which it is held, are distinct from one another: since the field is still the same, whilst the claim to it has undergone these several changes. The same observation is applicable likewise to incorporeal things, in <sup>b</sup> which number civil power is to be reckoned. And the caution, which our author here recommends, is, that we are not to judge of the power of a king from the tenure, by which he holds it, or by the nature of his claim to it. He may have the supreme claim to it, or may hold it in full property, and yet the power so holden may be less than sovereign; or he may hold by usufruct, or for a time only; and yet, though the claim is of the inferiour kind, the power may be supreme.

It is questioned indeed, whether any one can have full property in civil power, whether a kingdom can be patrimonial, or whether the right to govern a civil society can possibly be alienable, at the discretion of the possessor, as his right to any other estate, or to any other part of his patrimony is. Certainly, when the people have vested civil power in any particular man, or body of men, this grant of theirs does not imply, that such power is alienable, that the man or the body of men, in whom it is so vested, have a right, either to exercise it themselves, or to alienate it to any one else, at their own discretion. Since a power to govern does not imply a power to chuse and appoint a governour; a king may be invested even with the sovereign power of governing, without having full property in that power, or without having a right to alienate it: because transferring this power from himself to any one else is in effect chusing and appointing a governour.

<sup>b</sup> See B. I. C. II. § X.



But this is not the point in question. Grotius nowhere supposes, that whoever is possessed of civil power, must necessarily have a right to alienate that power. On the contrary, the distinction, which he makes, between the power itself and the claim to such power, sufficiently shews it to have been his opinion, that a king may be possessed even of absolute power without having full property in it. It is granted therefore, that there is nothing in the nature of civil or even of sovereign power, which will necessarily give any person, in whom such power is vested, a right to alienate it. If nothing more is done, than merely to lodge that power in his hands, he will have no patrimonial right to it; for the reason already mentioned: a right to govern by no means includes or supposes a right to appoint another governour. But though a grant of civil power, from the people to their king, does not imply, that he shall have a right to alienate such power to whom he pleases, and consequently though there is, in the original settlement of a constitution, no occasion for the people expressly to stipulate, that the sovereign power shall not be alienable by him or them, to whom they intrust it; yet it may still be a question, whether it is impossible for the people to make it so; whether it is inconsistent with the nature of the thing for the people, when they vest the civil power in the hands of a king, or of a body of nobility, or even of their own representatives, to give them at the same time a right to dispose of their power, either to exercise it themselves or to alienate it to some one else.

The general objection, against the notion of a pleary right in civil power, which <sup>c</sup> Grotius mentions, does not seem to be decisive against his opinion, that such a right is possible. Free men, such as the members of a civil society must be, are not, it is said, matter

of commerce, they cannot be bought and sold, or alienated and acquired, as slaves are. This is undoubtedly true. When the civil government is transferred from the present possessor to some one else; he, who acquires the power so transferred, cannot acquire the same power, which the purchaser of a slave acquires over the person of the slave. But this is no reason, why he may not succeed by an act of his predecessor into the same power, which his predecessor had. It is not possible, that by such act he should succeed into more: and if he does not, the subjects will be just as much free men under the new governour, as they were under the old one. To suppose, that, if a king has a right to appoint his successor, or to alienate his kingdom, he must necessarily have a right to change the constitution, to give such successor a greater power, than he had himself, or perhaps a power even of joining it as a province to dominions of his own, is supposing what is by no means contained in the notion of a patrimonial kingdom, and what Grotius particularly designed to guard against in this caution; where he has taken care to observe, that plenitude of property is so far from implying plenitude of power, that, if we were to enquire into facts, we should find, the inferiour sorts of civil power as marquisesates or dukedoms to be more frequently alienable than sovereign power.

We indeed in this kingdom have been brought up under such a constitution of government, as will make us wonder at the notion of any kingdoms being patrimonial, if we have never looked beyond what passes amongst ourselves. But whoever has looked abroad, and has considered with the least degree of attention what has passed in other kingdoms even in Europe will find, that, in the common opinion of mankind, kingdoms may be alienable, in like manner as other inheritances are. It can scarce

admit of any question, whether they are so in themselves. <sup>d</sup> Mr. Lock's reasoning upon this head seems to be decisive. "The legislative cannot transfer the power of making laws to any other hands. For it being a delegated power from the people, they, who have it, cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting a legislative, and appointing in whose hands that shall be, and when the people have said we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen and authorised to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."

But then though a king with legislative power cannot in virtue of such legislative power alienate his kingdom, so that sovereignty in government does not imply such a sovereignty to be alienable, or plenitude of power does not imply plenitude of property in such power; yet there is still a farther question, whether the people, who delegated the sovereign power could not likewise confer a right upon the person or persons to whom they delegated such power, of making it over to others? whether, as they gave the legislative power, they could not likewise give a right of transferring that power? If they could, then kingdoms, though they are not patrimonial in themselves, may be made so by the consent of the people, not only

<sup>d</sup> Lock's works V. II. p. 215.



by a concurrence at the time of transferring the sovereign power from the present possessor to his successor, but by a prior grant at the time of delegating the sovereign power to such present possessor, or at any other time.

There are certainly many inconveniences, which would probably attend such an establishment as this ; but none of them shew it to be impossible. The danger which a nation is in, of being made a province, is one of these inconveniences, and has been mentioned already. And upon that occasion we observed, that plenitude of property in civil power would not give a king or any other governing body a right to do this : because, though they may have a right given them to alienate the power, which they have, it is no consequence, that they have a right to transfer a power, which they have not. The successor can have no right to any thing, which his predecessor had no right to : so that, if the nation was no province under the predecessor, it cannot of right become one by the transfer of civil power to his successor. Another inconvenience, attending such an establishment as this, is the possibility of the governments coming into improper hands, of its being alienated to such persons, as are neither agreeable to the people, nor fit for the office. This inconvenience, however great it seems to be, though it may shew, that no nation would be likely to agree to such an establishment ; if they were in so good a situation, as to be able to procure a better ; yet will never prove such an establishment to be impossible, in the nature of the thing. An inconvenience of the like sort may be apprehended, where the constitution has made even a limited, and much more, where it has made an absolute monarchy hereditary. In the course of succession the civil power may come into the hands of a person, who is neither agreeable to the people, nor fit for the office. And yet the apprehension of such inconvenience

would be looked upon as a very weak argument to prove, that all laws, which have entailed civil power upon such a particular person, and the heirs of his or of her body, are inconsistent with the nature of civil society, and consequently that such laws, however they are made in fact, are in right no laws at all.

It seems to be true in general, that what the collective body of the people do by another, whom they have appointed to act for them, is as much their own act, as if they did it themselves in a full assembly. In a kingdom made hereditary by law, whether the king is limited or absolute, if there is a vacancy of the throne, either by abdication or otherwise, the choice of a successor, and the future settlement of the constitution would undoubtedly be binding upon the whole society, if such choice and settlement were made by persons entrusted for that purpose by the people; though this choice and this appointment were not made in a full assembly of the whole collective body. We see therefore, that the people may depute persons to choose governours for them, whether such governours have only a share in the legislative power, as in limited monarchies, or have the whole of it, as in absolute ones. And if it is not impossible in the nature of the thing, that is, if it is not inconsistent with the nature of civil society, for the people to delegate their rights of choosing legislators; it can scarce be thought impossible in the nature of the thing for the people to delegate such a power to the legislative in present possession. So that, though a king or a legislative body, merely as such, can have no right of appointing their successors, or of transferring their power to such successors; yet there does not appear to be any reason, why the collective body of the people may not, if they think proper, delegate or convey this right to their king or legislative body. And consequently, though no kingdom, however absolute the power of

the monarch may be, is in its own nature patrimonial ; yet a kingdom may be made patrimonial by the consent of the people : it is possible for them, not only by their immediate concurrence to make a transfer of the power of governing them from the present possessor to any other person, whom they shall expressly approve at the time ; but it is possible for them, by some former act of consent, to have given the present possessor a right to transfer that power to such person, as he shall approve of : and such a former act of consent will make his choice in effect their own.

Our author's caution about this matter, may be proper to be repeated here ; he observes, that this tenure of civil power, which we have called plenitude of property in it, and which is the supreme or highest tenure possible, is no evidence, that he, who holds by it, has plenitude of civil power, or that his power is sovereign : for the tenure, by which the power is held, and the power itself are different things ; so that a power, which is patrimonial, may as well be an inferior sort of civil power as sovereign or absolute civil power.

On the other hand ; civil power may be sovereign or absolute, notwithstanding it is held by a tenure, which is inferior to plenary property, by a claim of use and profits, or by a temporary claim. Where the constitutional laws of a civil society have settled the succession to the crown, and have determined beforehand to whom it shall descend upon every demise ; the present possessor, as our author says, holds his power by a tenure of usufruct ; the use and profits of it are his to enjoy, but the thing itself is not his to dispose of. In like manner ; where the crown is elective, and upon every vacancy the people have a constitutional right to chuse the successor ; the present possessor holds by a claim of use and profits.



Perhaps in this latter instance the tenure may rather appear to be temporary: since the right continues only for a certain term, for the life of the present possessor, and no longer. Whereas in the former instance of hereditary kingdoms the right continues to himself and such heirs, as the laws have limited; so that those heirs, by the aid of such laws, claim in intestate succession: and consequently the thing so claimed seems to be his by more than a temporary right; it is transmitted from him to his heirs by the aid of the law, though he has no right to transmit it by his own act to whom he pleases.

It is not however worth the while to enquire particularly, whether the tenure in elective kingdoms is of the temporary; or of the usufructuary sort. All that is necessary for us to observe here is, that an usufructuary claim to civil power is no evidence, that the power so held is not of the highest sort. The right, by which a thing is claimed, is different from the thing itself: the nature of the claim therefore does not determine the nature of the power, which is claimed: and he, who should know, that the civil power in any country belongs to the king by a claim of use and profits only, and not by a claim of full property, will have gone but a very little way towards determining, whether the constitutional power of such king is absolute or limited; whether the sovereign power is vested in him, or in the people, or in the nobles, or in all together. For as patrimonial civil power may be of the inferiour sort; so usufructuary civil power may be sovereign.

If we look upon the power of an elective king to be temporary; this might serve as an instance to shew us, that it is possible for civil power, though it is given only for a time, to be absolute as long as it lasts: since it is possible for the people, though they chuse their king only for life, to make his power absolute, as long as he

lives. Grotius here makes use of the instance of the Roman dictator's power, in the beginning of that commonwealth, before the horatian law had made it capital to create any magistrate, that should not be subject to appeal. Nor can it be maintained, in opposition to this instance, that the dictator's power, before this law was made, could not be absolute, merely because it was only temporary: since the nature of a thing does not depend upon the time of its continuance. If civil power may be absolute, when it continues for the lives of a man and of his heirs; it may likewise be absolute, when it continues only for six months. The way to judge, whether it is so or not, is to consider the effects of it. Now the effects of sovereign power are such, that no other civil power within the state can make them void. And as the effects of the dictator's power were of this sort, as long as that power lasted; the power, which produced these effects, could not be less than supreme, notwithstanding the claim to it was only temporary. If indeed we consider the majesty or dignity of the person, who is invested with such temporary power, instead of considering the power itself; it must be confessed, that a temporary magistrate has less of that majesty and dignity, than one, who is perpetual: not because his power is less in itself; but because the people cannot readily bring themselves to pay as much respect and reverence to one, who, though he is now their superior, will soon be reduced to a level with themselves, as they willingly pay to one, who will be their superior as long as he lives.

XV. <sup>c</sup> Grotius has mentioned a third caution, which is to be observed in forming a judgment upon the civil constitution of government in any nation, and of the power, which the people have lodged in the hands of their king. The caution is, that the power of

Promise or  
oath of a  
king may  
limit his  
power.

<sup>c</sup> Ibid. § XVI.

the king may be sovereign, so as not to be constitutionally subject to the control of the people, notwithstanding he bound himself to the people by some promise or oath, when he accepted the crown, not merely to observe the law of nature or the law of God, which he would have been obliged to observe, without such engagement, but to observe some other rules, or to act under some other restrictions, which otherwise would not have been binding upon him.

We shall the better understand whether we can allow this caution to be well grounded, if we consider it both where the promise or oath is required of him by the immediate act of the people, or by some fundamental law of the society, as a necessary condition of his receiving the civil power, with which he is about to be invested; and likewise where such promise or oath is wholly voluntary in him, and is matter of his own mere grace and bounty.

In the former case; if the constitutional laws require him to promise or swear to observe certain rules in his future government; or, where there are no such laws, if the people, when they make over the civil power to him, impose this promise or oath upon him, and will not lodge it in his hands upon any other terms; I do not see, how such a promise or oath can be consistent with the notion of his civil powers being in all respects superior to that of the people. A promise or oath of this sort is plainly a stipulation between him and them, and is the method, which they make use of to ascertain their own constitutional rights, as well as to bind him not to exercise any power, which shall violate those rights. But if they have a constitutional authority to require, that he shall promise or swear to observe certain rules in his future government; it seems absurd to suppose, that they have no constitutional au-



thority to enforce the observance of those rules and to see to his performance of such promise or oath. And how such an authority, as this, in the people, is consistent with full or absolute sovereignty in him, is more than I can understand. If indeed any one chooses rather to say, that, where a promise or oath of this sort is not observed, the constitution is broken, and the people have, though not a constitutional, yet a natural right to resist him in the exercise of any power, which is contrary to his promise or oath; it will scarce be worth the while to enter into a dispute upon this point: since the king and the people will in effect be in the same situation, if the people have a right to resist the exercise of such power, whether this right is to be called constitutional or natural, whether it arises from a superiority of constitutional power on their part, or from a breach of the constitution on his.

It is only to such a promise or oath, as is matter of mere bounty, that a nice distinction made by our author can possibly be applied: this distinction, if it was, ever so just, is by no means applicable to constitutional oaths or promises. Let us however examine the distinction itself, and perhaps we shall find, that it has no foundation. An oath or promise, says Grotius, which is taken by a king, when he comes to the government, may either be such an one, as restrains him in the exercise of his civil power in some instances, or such an one, as gives up the power itself in the like instances. Suppose him to promise, that he will confine certain offices of profit or trust to persons of such a rank, or of such qualifications, as the promise specifies; or that he will not raise any taxes, or impose any new tolls or customs, but such as have been used to be paid. By a promise of this sort he restrains himself, according to our author's opinion, in the exercise of his power, but does not part with the power itself. Whatever therefore he does af-

terwards, which is contrary to such a promise as this, will be wrong. But then, says our author, as he has retained the power of acting, though he has limited himself as to the exercise of it, what is so done will not be void. And from these principles Grotius concludes that such a promise or oath does not make his civil power less than sovereign, as it does not appear to affect the validity of his acts at all, and much less does it imply or create in the society any power superiour to his own. But suppose, as our author goes on, that his promise or oath is conceived in such terms, as to contain not merely the rules, by which he engages to act in certain instances, but a renunciation likewise of the power of acting otherwise, than the promise or oath expresses: whatever is done contrary to a promise or oath, of this sort will indeed be void. But then Grotius reminds us, that civil power is sovereign, when none of its acts can be made void by any other power within the society, and that in the instance before us the acts of a king, which are contrary to such promise or oath, are not made void by any other power within the society, but are void in themselves, upon account of a defect of power in him, who does them. His conclusion therefore is, that the invalidity of these acts is no evidence, that there is any power within the state superiour to his own, and consequently is no evidence, that his power is not sovereign. But there does not seem to be any foundation for distinguishing here between a promise or oath, which limits the king in the exercise of his power, and a promise or oath, by which he renounces the power itself. Every promise, if it has any effect at all, must be a renunciation of power, as far as it extends. A promise in its own nature affects the liberty of the promiser, by obliging him to act in a particular manner: and it is impossible to conceive, how he should have obliged himself to act in a particular manner, without having given up his liberty or

power of acting in any other manner. All promises therefore or oaths, though they are voluntary on the part of the king, are renunciations of his power to govern by any other rules, than those, which he has promised or sworn to observe. The consequence of which is, that all such acts, as are contrary to these rules, will be void.

This Grotius allows to be a diminution of his power as to the extent of it; though he thinks it still continues the same as to its degree. To clear up his meaning in this second distinction we will suppose the two following cases of a promise or oath. First; the future king may merely renounce his right to do certain acts, which, by virtue of the civil authority vested in him, he might otherwise have done. Or secondly; he may not only renounce his right to do those acts, but may give the people a right to control him, if ever he does them, by agreeing, that they shall never be done, without their consent, signified either by themselves or their representatives. Whatever he does contrary to his promise in either of these instances will be invalid. In the first of them it is, that Grotius supposes what he does to be invalid without any diminution of his sovereignty as to the degree of it; because his acts, done contrary to his promise, become invalid by a defect of power in himself, and not by the superiour power of any one else. In the second instance his power cannot well be thought sovereign, because he vests that power in the people, which he renounces for himself, and by that means establishes a power within the society, by which his own acts may be made void. When our author allows, that the promise or oath of a king, in the first of these cases diminishes his power, as to its extent, but not as to its degree; he seems to mean, that where the king, before he enters upon his office, has, as the case is put, merely renounced the power of doing some acts, which he



otherwise might have done, without vesting the power so renounced in the hands of the people; his power is necessarily abridged as to the extent of it; because some acts, which he does, will be void in consequence of his promise, though they would not have been void, if no such promise had been made. But then in the mean time his power is not diminished as to the degree of it: unless he transfers to the people what he renounces for himself; because, unless he does this, there will be no power in the state superiour to his own.

Yet after all, this second distinction is of no weight in the present question. The whole civil power is originally in the body of the society. Suppose therefore, that they either elect a king, and would vest the whole civil power in his hands; or suppose, that they have formerly made such a delegation of civil power to their king, and have established it by law to his heirs after him; if any promise of such king to the people, when he takes the government upon him, is considered as a renunciation of any part of the civil power, it must naturally give or rather return such power to the people, from whom it originally came. It is impossible for the civil power not to exist somewhere in all its parts: if he has it not, the people must have it. Certainly therefore, if the constitution of government in any country was at its first establishment designed to be absolutely monarchical; such a promise prevents it from being so: and if this form was once established, such a promise from any subsequent monarch must change the constitution, and restore to the people so much of the civil power, as is contained in the promise.

Mixed  
constitu-  
tions.

XVI. After what has been said already, we need not enlarge upon the fourth caution, which <sup>e</sup> Grotius proposes to be observed in judging of a civil constitution: the caution is, that though sovereign power seems

ibid. § XVII.

in its own nature to be simple or indivisible, as being the act of the common understanding directing what is to be done, yet it is not necessary, that this should be the understanding of any one man as in monarchies, or of any single body of select men, as in aristocracies, or of the representative body of the people, as in democracies: it may be the joint understanding of a mixed body composed of any two or all of these. So that all civil constitutions are not necessarily one of the three simple sorts: and in most nations we should find it very difficult, in some nations we should find it impossible, to reduce the constitution to one or other of these sorts, and should form a wrong judgment about them, if we imagined them capable of being so reduced.

XVII. To these cautions we may add a fifth, which is, that when, in reading the history of a nation, we have discovered what its civil constitution was in any former period of time, we must not from thence conclude it to be the same at present: because civil constitutions like all other things are subject to alterations. The means, by which alterations may be produced in them, shall be enquired into hereafter.

Civil constitutions may be altered.

## C H A P. V.

Of the changes, which are produced in the rights of individuals by civil union.

- I. *Rights of mankind how changed in civil society.* II. *Right of private defence how restrained in a state of civil society.* III. *Origin and nature of civil jurisdiction.* IV. *How civil jurisdiction ceases.* V. *Right of defence, where civil jurisdiction ceases in fact.* VI. *Right of defence, where civil jurisdiction ceases of right.* VII. *Right of reparation how subjected to civil jurisdiction.* VIII. *Civil jurisdiction in respect of reparation cannot cease in fact.* XI. *Right of punishing how restrained by civil jurisdiction.* X. *Difference between jurisdiction in matters of damage and of punishment.* XI. *Right to punish how vested in the civil magistrate.* XII. *How far civil jurisdiction may cease in respect of the right to punish.* XIII. *Natural principles applicable to social punishment.* XIV. *Actions not punishable by individuals may be punishable by magistrates.*

Rights of  
mankind  
how  
changed  
in civil  
society.

I. **T**HE rights of mankind, when we consider them as members of a civil society, are different in many instances from what they were in a state of nature. This difference arises either from civil union, or from civil laws. Some of the rights of mankind, when they are united into a civil society, are made different from what they were in a state of nature, by the immediate operation of that compact, which forms or unites them into such a society. Whilst some of them undergo no immediate alteration by this compact, but only are subjected by it in general to the authority of civil laws:



so that such actual alterations, as they undergo afterwards, are produced immediately by these laws, and only remotely by civil union. After a number of individuals have agreed to join together into one body, for the purpose of securing one another, by their common force, against injuries, they are not so free to act for themselves for this purpose, at their own discretion and by their own private force, as they were before they made this agreement. <sup>a</sup> But since many of the rights of mankind consist in nothing else but in the liberty of doing certain actions; it follows, that, in whatever instances their liberty of acting for themselves is restrained by such an agreement, their rights by this act of civil union become different from what they were in the liberty of nature. But mankind form themselves into civil societies, not only for the purpose of securing themselves against injuries, but for the farther purpose of advancing a general good. The compact therefore, which forms or unites them into such a society, binds them to act for the general good by following such rules, as the common understanding of the society shall judge to be necessary for obtaining it. In consequence of this obligation, their liberty of acting is liable to be restrained by these rules, that is, by the civil laws of the society, in many instances, where the mere act of civil union had laid it under no particular restraint. All such restraints upon their liberty, as arise from this cause, are so many changes produced in their rights by the immediate operation of civil laws.

II. Civil union lays the foundation of all the alterations, that are made in the rights of individuals, after they are become members of a civil society, by subjecting them to such future restraints as shall arise from the laws of that society. But the rights, that are actually altered by civil union only, without the aid of civil laws, are

Right of  
private  
defence  
how re-  
strained  
in a state  
of civil  
society.

<sup>a</sup> See B. I. C. II. § III.

chiefly such, as arise from an injury, either before or after it is committed. <sup>b</sup> We have already seen at large what these rights are : so that it will be sufficient here only just to mention them. Individuals, in a state of natural liberty, when they find themselves to be in danger of suffering an injury, have a right, before it is committed, to defend themselves against it at their own discretion, and by their own force. They have likewise, after an injury is committed, a right to use the same means, both to obtain reparation for the damages, which they have sustained by it, and likewise to inflict punishment upon the authors of it. Some alterations are made in each of these rights by civil union : and we are now to enquire what those alterations are.

Individuals are restrained by the act of civil union from defending themselves against an injury by their own private force and at their own discretion, and are obliged to apply to the society, or to the civil magistrate acting for the the society, to defend them by the use of the common force under the conduct of the common understanding. It is the more necessary to inquire into the manner, in which this restraint upon the right of private defence is produced ; because most of the writers upon natural law seem rather to take it for granted, that there is such a restraint, than to explain the cause of it.

This inquiry might be soon brought to a conclusion ; if it could be shewn, that individuals explicitly renounce their right of defence, and transfer it from themselves to the civil magistrate, by the social compact, that is, by the compact, which unites them into a civil society. By this compact all the individuals bind themselves to act with their joint force for the preservation and support of their rights : and all of them bind themselves likewise to advance and secure the general good by following such rules, as the common understanding shall

<sup>b</sup> See B. I. C. XVI. XVII. XVIII.

prescribe to them for this purpose. These two parts make up the whole of the social compact: and, whatever may be implied, there is certainly no renunciation of their right of private defence, nor any transfer of it from themselves to the civil magistrate, explicitly contained in either part of it.

After the civil laws of any nation have commanded the several members of it not to defend themselves by their own private force, but to apply to the civil magistrate for this purpose; their right of private defence will then undoubtedly be restrained. For one part of the social compact subjects mankind in a state of civil society to the authority of civil laws, by binding them to follow such rules, as the common understanding shall prescribe for the advancement and security of the general good. But this does not come up to the point in question, nor to the common opinion about it. We are not enquiring, whether the right of private defence may be restrained by laws, which become binding in consequence of civil union; the point in question is, whether it is not restrained by the mere act of civil union without the aid of such laws. And the common opinion about this point is, that mankind, considered merely as members of civil society, have no such right of private defence; whether any express laws have been made to restrain it, or not.

The other part of the social compact places each individual under the protection of the whole body, by binding them all to act with their joint force for his defence. But if we look no farther than his right to protection, it will be no direct consequence, that by acquiring this right his own right of private defence is lost or restrained. For there is no direct inconsistency between his having a right to prevent or to repel an injury by his own force, if he thinks it safe and prudent



to act alone, and his having a right to be assisted by others, if he finds himself too weak to prevent or to repel it without their assistance.

We have<sup>c</sup> elsewhere had occasion to mention a second social compact, by which, after a civil society is formed, some particular civil constitution or form of civil government is introduced and established. It will be needless to stop here and enquire, whether this is properly a compact or a civil law. We shall have an opportunity of examining into this matter hereafter : and though, if it should then appear to be a law, any restraint, that it may lay upon the right of private defence, would rather be a restraint arising from civil law, than from civil union, yet as we have hitherto called it a compact, we will still suppose it to be properly a compact, and will call it so in the present question. By this second compact, which we here consider as a joint agreement of the several members of the society, amongst other effects, which it produces, civil magistrates are appointed for the purposes of doing justice to all, who are under the protection of such society.<sup>d</sup> It may therefore be imagined, that their agreement to appoint civil magistrates, for the purpose of defending them, implies their consent to transfer their right of private defence from themselves to such magistrates. But not to insist again, upon what has been mentioned already, that their acquisition of a right to be defended by others, whether by the collective body of the society or by the magistrate, does not directly imply the loss of their right to defend themselves ; we may observe, that a civil magistrate, or an executive body acting under the checks of the law, is nothing else but a part of the society, which is appointed to act for the whole of it. The right therefore, which this second compact conveys to the magistrate, though it may be less, cannot possibly be greater, than what the

<sup>c</sup> See B. II. C. IV.

<sup>d</sup> Grot. L. I. C. III. § I.

first compact had given to the collective body of the society : so that unless we can shew, that the first compact gives the collective body such a right or such a power, as is inconsistent with a right of private defence in the individuals ; the second compact can convey no such right or power to the civil magistrate.

There is a plain reason, why the society will interpose and hinder a man from making use of his own force upon any occasion and in any manner, that he pleases, against those, who are under its protection. The society by receiving them under its protection, obliges itself to take care, that they shall suffer no causeless harm. And this obligation requires, that it should not allow him, or any one else, to act against them at discretion, even for his own defence : because he might possibly do them an injury under the notion of defending himself from suffering one. He might pretend, that they designed, or were preparing, to injure him ; when there was no ground for such a pretence : or even if they did design to injure him, yet he might be unjust, both in his demands of security, and in the manner of enforcing those demands. But this restraint, upon his right of private defence, is a restraint rather in fact than of right ; though the society is obliged to secure them, who are under its protection, against all causeless harm ; yet he in the mean time if he is no party to this obligation, will have a right to defend himself at his own discretion and by his own force. Such a body of men will be stronger than he is, and will therefore be able to hinder him from using his right : but this is no evidence, that his right does not subsist ; because it is no evidence, that he is obliged to submit to be so hindered, if he was strong enough to help it, and thought himself to be doing nothing, but what the law of nature will justify. Such

a restraint as this upon his right is no other, than what he might have met with in the liberty of nature; if the individuals, that he had to deal with, happened to be stronger than himself: they might have stopped him from using his right of private defence, till they were satisfied, that his defence was lawful: but in the mean time he would not have been obliged to submit to their determination upon this head, but would have been at liberty to determine upon it for himself. And as he had a right in a state of equality to judge for himself, whether the occasion of defending himself, and the means, that he made use of for this purpose, were justifiable, or not, and to act accordingly; notwithstanding the individuals that he happened to have to deal with, might be stronger than he, and might force him to submit to their judgment; so likewise in a state of civil society, though such society may in fact stop him from defending himself, at his own discretion and by his own force, against any persons, who are under its protection; yet if we consider it as doing this, only in consequence of its obligation to guard those persons against suffering any causeless harm, without any consent on his part, he will still have the right to judge for himself and to act accordingly.

We have now seen, where any person is in danger of being injured by others, that neither the obligation of a civil society to protect them against causeless harm, nor the right, which he has to protection, will take away his liberty of private defence; if the obligation of the society, and his right are considered separately. But if his right to protection is a right to be protected by the same society, which is obliged to protect them, and we consider this right, or rather the conditions, upon which he acquired it, and the obligation of the society together; we shall then find, in this view of the matter, that the same act of social union, which



gave him a right to protection, put his liberty of private defence into the hands of the public, or of the civil magistrate, who acts for the public. The obligation of the society towards them, if he is no party to it, will produce only a restraint in fact, and not a restraint in right, upon his liberty of private defence. But whatever act of his makes him a party in this obligation, either as such act declares or as it implies his consent, that as far as he is concerned, the society should protect them; this act of his gives the society such a right, as restrains his liberty of private defence in respect of them. The act of civil union, or the act of putting himself under the protection of a civil society, is an act of this sort: it implies his consent, that as far as he is concerned, the society should guard all others, who are under its protection against suffering any causeless harm. And the reason, why his act of civil union, or his act of putting himself under the protection of the society, must be understood to imply, that he consents to these conditions, is, because the society, being from the nature and design of it obliged thus to guard all others, who are under its protection, could not consistently with this obligation take him under its protection, unless he consented, and was willing to make himself a party, to the same obligation.

Upon the whole, an individual is understood by the act of civil union to part with his right of private defence; not merely because this act places him under the protection of a civil society; but because it places him under the protection of a civil society, which stands engaged to protect those, who are about to do him the injury, as well as to protect him, who apprehends himself to be likely to suffer it. This act implies, not only that he is willing to acquire a right of being protected

by the common force against any causeless harm, which they might possibly do him, but likewise, that he consents to their having a right of being protected by the same force against any causeless harm, which he might possibly do them : it must be understood to imply such consent ; because without consenting to their right of protection, he could not acquire a right of protection for himself.

From hence it follows, first ; that the jurisdiction, which a civil society has over any individual in respect of the right of private defence, supposes both the individual who is in danger of being injured, and them likewise, who are about to injure him, to be under the protection of one and the same civil society : because it is his consent to their right of protection, which restrains his own right of private defence ; and this consent of his is given no otherwise than by his acquiring a right of being protected by the same society, which is obliged to protect them.

Secondly ; it follows from hence, that the jurisdiction of a civil society over the liberty of private defence is a right to restrain one member, from acting against others by his own force and at his own discretion, as far as such a liberty of acting might expose them to any causeless harm. And consequently the society has a right, not only to judge, whether the occasion of defence is just, but likewise to take care, that nothing is done unjustly even upon a just occasion. After he has made it appear to the society, that he is in danger of suffering an injury ; the jurisdiction of the society over his right of defence does not stop here : he might, if he was left to himself, demand such security, as he has no right to, because he might demand such, as he had no occasion for ; or he might do them more harm in obtaining the security, to which he has a right, than he ought to do them ; because he might

do them more harm, than is necessary to obtain it. He is therefore not at liberty to make use of his own private force, or of any other force, which is managed at his own discretion, but is obliged to make use only of the common force, which is under the direction of the common understanding.

III. \* Notwithstanding mankind are now united into civil societies; yet the right of private defence still subsists, where civil jurisdiction ceases. The reader will be better able to understand both in what cases civil jurisdiction ceases, in respect of the right of private defence, and why in those instances this right should subsist, after civil union; if we first enquire into the nature and origin of civil jurisdiction.

Origin  
and na-  
ture of  
civil ju-  
risdiction.

By civil jurisdiction we mean a right, which a civil society, acting either by its collective body or by its magistrates, has to determine any matter, that is in dispute between two or more persons, and to compel them by the public force to submit to its determination, if they do not submit to it of their own accord.

Jurisdiction is divided into two sorts, a jurisdiction over persons, and a jurisdiction over things. Indeed all jurisdiction is ultimately over persons: for it consists in a right to determine controversies between two or more persons, and to compel the persons concerned in such controversies to submit to the determination. But a civil society may have this right, either upon account of some purely personal circumstances of the parties contending, or upon account of the thing, about which they contend: and to distinguish these two cases from one another, the former is called a jurisdiction over the persons, and the latter a jurisdiction over the thing. Where the persons concerned in a dispute are obliged from their personal circumstances, if they cannot

Grot. L. I. C. III. § II.



adjust it amicably, to have recourse to the public for a determination of it; the right of the society, which corresponds to this obligation, is a jurisdiction over their persons. Where they are obliged thus to have recourse to the public, not merely because their own personal circumstances oblige them, but because the thing in dispute is in the power of the society, and can be no otherwise claimed by either of them, than by the consent and under the direction of the society; the right in the society, which corresponds to this obligation, is a jurisdiction over the thing. Thus if we consider only the immediate cause of jurisdiction, as it arises either from the personal circumstances of the parties contending or from the situation of the thing in dispute; it may be distinguished into these two sorts: but if we consider its operation, as it binds the parties to submit to the determination of the society, all jurisdiction, in this view of it, may be said to be over persons.

The foundation of all civil jurisdiction over persons is laid either immediately or remotely in such a civil union, as places the persons concerned on one side, in any controversy about matters of right, under the protection of the same society, that is to protect the persons concerned on the other side. We have seen <sup>f</sup> already, that this is the origin of civil jurisdiction in matters of defence, and shall see presently, that it has the same origin in matters of reparation and of punishment. Many rights of mankind indeed are not brought under the jurisdiction of society immediately by the act of civil union, or merely upon the account of the common protection, which the same society owes to the person in controversy. But the obligation of civil laws is derived from civil union: and those laws, where the general good requires it, may restrain such of their rights, as

<sup>f</sup> See § II.

were not restrained by the immediate act of civil union, and may by this means give the society a jurisdiction in many instances, where the mere act of civil union had not given it any. Civil jurisdiction over the persons of individuals must either immediately or remotely have its foundation in civil union, or in some act, which is equivalent to it. For since all men are <sup>g</sup> naturally equal, and are naturally at liberty to judge and to act at their own discretion, no civil magistrate and no civil society can have any right to judge and to act for them, or to restrain them from judging and acting for themselves; unless they have some way or other consented to give the magistrate or the society this right. And this consent appears no otherwise, than by their joining themselves to the society, or however by their putting themselves or their rights, by some means or other, under the protection of the society. The jurisdiction, which a civil society has over things, as far as it affects any person, who is not under the protection of that society, may be thought an exception to this rule: but we shall see presently, that this is rather a natural, than a civil jurisdiction. It may be called a civil jurisdiction, as it belongs to a civil society, but it is in fact no other right, than what in some sort individuals have in the liberty of nature, and arises rather out of property than out of civil union.

When <sup>h</sup> a number of individuals have united themselves by consent into one body, and have settled upon any tract of land; such a collective body, by this act of settling there, or by this occupancy in the gross, acquires a general property in the land. This general property of a civil society is like the particular property of individuals in a state of independency. As the particular property, which an individual has in a parcel of land, after he has seized upon it, is a right of such individ-

<sup>g</sup> See B. I. C. X. § III.

<sup>h</sup> See B. I. C. III. § XIII. XIV.

ual to exclude all other individuals, whether they are few or many, from having any thing at all to do with this small parcel of land ; so the general property, which a civil society, or a number of individuals united into one body and acting together, acquires by occupancy in the tract of land, where it settles, is a right of such collective body to exclude the rest of mankind, all other civil societies, and all other individuals, who are not members of this body, from having any thing at all to do with this large parcel of land. This exclusive right of general property in a civil society, as it is distinguished from the private right of the same sort, which the several members have in their separate shares or estates, is called the jurisdiction of the society over the land : and that whole tract of land, which is thus under the jurisdiction of the society, or in which the society has such an exclusive right of general property, is called its territory. One immediate and necessary effect of this jurisdiction, as has already been shewn, is, that no alien is capable of having private property in any part of the territory, or rather that no member is capable of transferring such private property to an alien, without the express consent of the society. We have likewise taken notice of an accidental effect of this jurisdiction in respect of aliens, which is, that, since no alien can have any right to come within the territories of the society, if the society chuses to hinder him, it follows, that no alien can take even moveable goods, which are within the territory, though they are no part of it, if the society has forbidden it. In general the jurisdiction of a society over its own territory subjects all the rights, that any person may be supposed to have to any thing, which is either a part of the territory or within it, to be regulated and governed by the society : even the rights of aliens are subjected by it to be thus regulated ;

<sup>i</sup> See B. I. C. VI. § VI.



notwithstanding such aliens, as to their persons, are neither members of the society, nor have ever put themselves under its protection. In the mean time this is no more inconsistent with the natural liberty of such aliens, than it is inconsistent with the liberty of an individual in a state of nature, if he chuses to accept of a part of any other individuals private estate, to be bound to accept it upon such terms, as the owner of the estate shall prescribe, or if he chuses to <sup>k</sup> hunt upon the soil, or to fish in the waters of another, to be bound not to hunt such beasts, or not to kill such fish as the owner forbids him to meddle with. For as the right of the individual, in one case, depends upon the will of the owner, so the right of the alien, in the other case, depends upon the will of the society. The particular property, which the owner has in the land, makes it lawful for him to keep it to himself and not to give any part of it to the other; and his particular property in the soil or the water makes it lawful for him to hinder the other from using them at all. No injury therefore is done to this other, if the land is not given him, or if the use of the soil and the water is not allowed him upon his own terms, but upon such terms only as the particular owner thinks proper. In like manner the general property, which the society has in its territory, makes it lawful for such society to confine all private property to its own members, without granting an express allowance to any aliens to have any land, which is a part of the territory: and the same general property makes it lawful for the society to hinder any alien from coming into the territory to take away such moveable goods as are found within it. No injury therefore is done to such alien, if he is not allowed to acquire private property there, or to take any moveable goods from thence, upon his own terms, but upon such terms only, as the so-

<sup>k</sup> Sec B. I. C. V. § V.

ciety, which is the general owner, thinks proper. But if the society, upon account of its general property, has a right to hinder those, who are neither members of it nor under its protection as to their persons, from taking such things, as are either a part of its territory or are within such territory; it necessary follows, where any dispute arises concerning such things, that though some or all the parties concerned in the dispute are otherwise not under the protection of the society, so as to give the society any immediate jurisdiction over their persons; yet in consequence of the jurisdiction, which it has over the thing in dispute, it will have a right to compel them either to take it according to the sentence which the society gives upon the dispute, or not to take it at all.

We may call this right by the name of civil jurisdiction, if we please; but it can be called so no otherwise, than as it belongs to a civil society: for it is a sort of jurisdiction, which does not arise out of civil union. And indeed though it may belong to a civil society, yet it is not confined to a civil society: it is a right, which is incidental to property either general or particular, and may as well belong to an individual in a state of natural liberty, as to a number of individuals united by social compact into one body. Or suppose this sort of jurisdiction to belong only to a body of individuals so united into one civil society; it would be still improper to say, in respect of those, who are not members of this body, that this jurisdiction, as it affects them, arises from civil union. Though we should suppose, what is not true, that civil union is necessary, before any such jurisdiction can subsist; yet it cannot be civil union, which extends this jurisdiction to aliens: because aliens are not in civil union with the society, which has the jurisdiction. But after all, those, who are not under the

protection of the civil society, and are therefore clear of its direct jurisdiction over their persons, may, if they please, avoid any indirect jurisdiction of this sort, arising from its general property, by not endeavouring to obtain such things, as are within its jurisdiction. And since their endeavouring to obtain them is their own act, even this jurisdiction over things becomes a jurisdiction over their persons no otherwise, than by their own consent. We cannot indeed say, that both or all of the parties, if they are more than two, who contend about a thing, which is in the jurisdiction of the society, must necessarily as to their persons, be under the protection of such society, or that the society will otherwise have no jurisdiction. But still the notion of common protection is so necessarily connected with the notion of jurisdiction, that the society could have no right to decide the contest, and to compel the contending parties to submit to the decision; if the rights of all of them, as far as this dispute is concerned, were not under its protection.

But we have no occasion to enter any farther into this enquiry concerning the jurisdiction, which a civil society has over its own territory, or over such moveable goods, as are within its territory. The jurisdiction of a civil society, as it restrains the right of defence, is a direct jurisdiction over the persons, and is founded partly in the protection, which he, who is to be defended, has acquired a right to, or rather in his consent to be restrained in his liberty of defence, which consent he must be understood to give by the same act, which gave him a right to protection; and partly in the protection, which the same society owes to them, against whom he is to be defended.

IV. <sup>1</sup> Civil jurisdiction may cease either in fact or of right. It ceases in fact, where any person has a right to

How civil jurisdiction ceases.

<sup>1</sup> Grot. *ibid.*



the protection of the society, but the society cannot in fact give him protection. What has been <sup>m</sup> already said concerning such civil jurisdiction, as restrains the right of defence, will serve to shew us, that where he, who is to be defended, is not under the protection of the society, the jurisdiction, which the society has over him must necessarily cease. For civil jurisdiction, in respect of the right of defence, supposes this and more than this; it supposes that both he, who is to be defended, and they likewise, who are about to injure him, are under the protection of the same civil society. Notwithstanding therefore he may have a right to be protected by the society, yet if in fact the society cannot protect him; the civil jurisdiction of the society, though it subsists of right, will cease in fact.

When civil jurisdiction thus ceases in fact, it may cease either for the present instant only, or for some indefinite length of time. A person, who has a right to be protected by a civil society, cannot in fact receive protection from it; sometimes because the society cannot interpose at the instant, when he wants its protection, though it might be able to interpose afterwards, when its protection would come too late; and sometimes because it cannot interpose either at the present instant, or at any determinate time hereafter.

Civil jurisdiction ceases of right, where there is no civil jurisdiction at all, that is, where no civil society has any right to interpose and restrain a man from acting for himself by his own force, and at his own discretion.

This division, though it is different from our authors as to the form of it, is the same with his in substance. He first divides the cases, where civil jurisdiction ceases, into those, where it ceases only for the present instant, and those, where it ceases for an indefinite length of time. And then he goes on to divide the cases, where it ceases

<sup>m</sup> See § II.

for an indefinite length of time, into those, where it ceases in fact, and those, where it ceases of right. But because civil jurisdiction can cease no otherwise than either in fact or of right; and because it does not appear in his division, whether it ceases in fact or of right, when it ceases only for the present instant, I have therefore chosen, whilst I kept to the substance of that division, to change the form of it.

Where civil jurisdiction ceases, either in fact or of right, there can be no doubt of a man's having the same liberty to defend himself by his own force and at his own discretion, notwithstanding he is a member of a civil society, that he would have had, if he and all mankind had still continued in the liberty of nature. For civil jurisdiction, in respect of the liberty of private defence, is the right, which a civil society has to restrain a man from deciding his own quarrel and to decide it for him: and in all instances, where the right of any civil society to restrain him from acting for himself ceases, he must necessarily be as much at liberty to act for himself, as if no society had ever been formed at all.

V. Civil jurisdiction ceases in fact, for the present instant; when the injury, which threatens us, is so immediate, that the public, or the civil magistrate for the public, cannot come to our assistance time enough to prevent or to repel it; that is, when we are in such circumstances, that we cannot possibly be defended at all, unless we defend ourselves by our own private force.

Right of  
defence,  
where civil  
jurisdiction  
ceases  
in fact.

But yet, if we consider any person as a member of civil society, we shall find, that, even in these circumstances, it is not every injury, which will justify him in proceeding to extremities. I do not mean that the injury, with which he is threatened, may be so remote or so uncertain, as to give him time to apply to the society and to obtain the assistance of the public to guard him



against it. There can be no doubt of his being obliged, as a member of civil society, to have recourse to the society where the injury is of this sort: because, in respect of such injuries as these its jurisdiction subsists both of right and in fact. He has a right to the protection of the public, and has in fact an opportunity of obtaining protection. But what I mean is, that the injury, though it is both immediate and certain, may be too small in its own nature to justify him in taking away the life of the aggressor, or in doing him any grievous harm, in order to prevent him from putting his design in execution. This is not merely matter of humanity or benevolence; but when he is considered as a member of civil society it seems to be what the society may claim of him. Lesser injuries, where men live in a state of society may commonly be repaired, after they are over. The magistrate perhaps has not an opportunity of repelling the harm, but he may and commonly will have an opportunity of interposing afterwards, to take care, that full amends shall be made to the person, who has suffered it. In respect therefore of such lesser injuries, as may easily be repaired, civil jurisdiction cannot properly be said to cease; however immediate and however certain they may appear to be. The members of the same civil society seem to be as effectually protected against one another, where they are sure of being made amends for the injury, that they have suffered, as where they are guarded beforehand against suffering it at all.

The loss of life indeed, or the loss of chastity, are in their own nature irreparable injuries. If the public cannot interpose to guard those, who are under his protection, against such injuries as these, they are as much at liberty, in a state of society, to defend themselves by all necessary means, as they would have been in a



state of natural equality ; even though the aggressor's death should be the consequence of their defence : because it is to no purpose for the public to interpose, after the injury is over ; if no amends can be made for the loss, that has been sustained.

Sometimes injuries of a lower sort, though they are not irreparable in their own nature, are irreparable by accident. And there is the same reason, why a man should be at liberty to defend himself against these, as there is, why he should be at liberty to defend himself against the other ; where he can have no assistance from civil jurisdiction. Of this sort we may reckon the loss of goods, where the person, who attempts to steal them is unknown ; or where though he is known, there is a moral certainty, that the public can never interpose, so as to obtain the restitution of them. The rules, that ought to be observed in these circumstances, are the same that ought to be observed, in a state of nature. And where the law of nature would justify a man, considered as an individual, in proceeding to extremities, the same law will justify him in taking the same measures, though he is a member of civil society.

When civil jurisdiction ceases only for the present instant, the danger must be immediate. But both the notion of an <sup>n</sup> immediate danger, and the notion of the present instant are to be understood with some latitude. Every danger is an immediate one, as to the purpose of allowing the members of any civil society to defend themselves against one another, if such danger is so near, that it cannot be avoided by any other means. And the present instant, as to the same purpose, is not a single point of time, that has no duration ; it is understood to continue as long, as the impossibility of obtaining the assistance of the magistrate continues. If a man has been threatening to kill you,

<sup>n</sup> Grot. L. II. C. I. § V.

and is seizing a sword or some other weapon, with a plain design, as far as you can judge, of putting his threats in execution; the danger is immediate enough to justify your defence of yourself, at your own discretion, without waiting, till the weapon is at your breast. Suppose, that you and the aggressor had closed with one another, and had struggled together for some time, before you were able to get such an advantage over him, as to make your defence effectual by dispatching him; though this length of time cannot strictly be called an instant, yet your right of private defence continues during the whole of it: because there is in every part of it the same impossibility of your being assisted by the civil magistrate or protected by the public.

° Grotius asks here, whether it would be lawful to secure our own life by killing a person, who attempts to take it from us by such means, as we are sure will operate effectually in the end, if we suffer him to go on with his design, though they do not produce their effect immediately? If, for instance, we are certain, that he lies in wait for us himself, or has conspired with others to take the first opportunity of destroying us by such means, as shall offer themselves, or by such means as they have contrived, by assassination, by poison, by a false accusation, false evidence, or an unjust sentence in a trial for any capital offence; may we lawfully kill him, to prevent such a remote injury, as this? Before a question of this sort can be properly answered, it ought to be stated more precisely, than it is stated here, by distinguishing between the case of persons, who live in a state of nature, and of persons, who are under the protection of the same civil society.

Grotius, by mentioning false accusations, false evidence, and an unjust sentence, seems to suppose the parties, concerned in the question, to be members of

the same civil society : because in other circumstances, the notion of accusations, evidence, and a judicial sentence are unintelligible. And certainly, if they are in a state of civil society, the person, who apprehends such a remote injury, though he is ever so well assured, that it will come upon him, unless he takes care to guard against it, has no right to defend himself by his own force, and at his own discretion. The reason, why he has no such right, has been given already : he has time enough before him to apply to the public for protection ; and where he has time enough for this purpose, that is, where civil jurisdiction does not cease, he is bound, as he is a member of civil society, to make use of the protection of the public for his security against all, who belong to the same society with himself.

But if we attend to the point, which our author had before him in this place, we shall find reason to think, that he designed to extend the question farther than this, and to enquire, not so much whether mankind have such a right of private defence in civil society, as whether they have it at all, either in a state of society or in a state of nature. He is here explaining what sort of injuries, before they are committed, are in his opinion justifiable causes of war in general, not only of public war, which is the war of societies, but of private war likewise, which is the war of individuals. And since private war may begin, not only amongst individuals, who are in a state of society, when civil jurisdiction happens to cease in fact ; but amongst individuals who never were in a state of civil society, or under any civil jurisdiction ; this question whether the use of force is lawful to prevent a remote injury, if we extend the sense of the words as far as the point, that Grotius had before him, requires, must mean not only, whether such use of force is lawful amongst the mem-



bers of the same society, when civil jurisdiction ceases, but whether it is lawful at all, even amongst individuals, that are under no civil jurisdiction, or are not members of any civil society. We have just now assigned the reason, why such persons, as are under the protection of the same civil society, are not at liberty to defend themselves by their own force against such remote injuries; not because they have no such liberty, where civil jurisdiction ceases, but because in respect of remote injuries, which in their own nature allow of time for an application to the magistrate, civil jurisdiction does not cease in fact. But <sup>p</sup> when we were explaining the right, that individuals in a state of nature have to defend themselves against injuries, before they are committed, we shewed in what manner this right may extend to such injuries as are at a distance.

<sup>q</sup> Where one part of a society is in a state of civil war against the other, or where the subjects are in a state of rebellion against their governours; individuals of the opposite parties, whatever they may be of right, are not in fact under the protection of the same society. Civil jurisdiction therefore, in respect of such individuals, as are of opposite parties, ceases in fact, not merely for an instant, but for an indefinite length of time; it ceases as long as the state of civil war or of rebellion continues; and in the mean while such individuals have the same right of private defence, that they had in the liberty of nature.

It is a more material question, whether the natural right of private defence returns, where the civil magistrate refuses to take notice of the danger, that a man imagines himself to be in, and to obtain security for him against suffering the injury, that others, as he apprehends, are preparing to do him. When <sup>r</sup> Grotius mentions this as one instance, in which civil jurisdiction

<sup>p</sup> See B. I. C. XVI. § V.    <sup>q</sup> Grot. L. I. C. III. § II.    <sup>r</sup> Grot. *ibid*.

ceases in fact; he must certainly suppose, that the man has met with this refusal not only from one civil magistrate, but from all, that have any authority to interpose in his favour: for in most civil societies there is a subordination of magistrates, and if those of an inferior sort refuse to relieve the person aggrieved, he may apply to those of a superior sort, who have authority either to grant him relief themselves, or to compel the others to grant it. And there is plainly no ground for maintaining, that civil jurisdiction ceases, upon account of his having met with a refusal from some of the magistrates; when there are others within the society, who might either defend him or take care, that he should be defended, if he had made his application to them. But suppose him to have met with a refusal from all, that he can apply to; such a refusal, as this, seems rather to be an act, than a failure of civil jurisdiction. Some injuries are so slight, that it is of no importance for him to obtain security against them, Suspensions of a future injury may be so uncertain, as to afford no ground for the society to interpose; or they may be so false, as to make it unjust to regard them; or they may be so malicious as to deserve censure, rather than redress. There may be these and many other reasons of the like sort, why his application to the public should be dismissed. When therefore the society, or the magistrate for the society, does dismiss it; this is to be considered as a determination of the society, that its interposition would be either unnecessary or improper. In this view of the matter, he can have no right of private defence, in consequence of such a refusal; unless we would suppose, what is confessedly false, that every man, after he is a member of civil society, has the same right to judge, whether the society has done him justice, that he has in a state of nature to judge, whether an individual has done him justice.

Right of  
defence  
where civ-  
il jurisdic-  
tion ceases  
of right.

VI. Civil jurisdiction, says our <sup>s</sup> author, ceases of right between persons, who happen to be out at sea, or in an uninhabited island, or in any other place where no civil society is established. His opinion is, that persons in these circumstances have the full liberty of private defence ; for as there is, by the supposition, no civil jurisdiction, as they are not under the protection of the same or indeed of any civil society ; there is nothing to restrain this liberty.

This opinion must however be understood with some restrictions : and we shall see more plainly what the necessary restrictions are, if we consider the person, who is in danger of suffering the injury, and the others who are about to do it, either as members of no civil society, or of the same civil society, or of different civil societies.

If he, who is in danger of being injured, and the aggressor are not members of any civil society, the case does not come within the present question. He has indeed a right of private defence ; but the ground of this right is not that civil jurisdiction ceases between them, but that they are still in a state of nature.

He and the aggressor may, when they were at home, be members of the same civil society ; and if they are, civil jurisdiction will cease between them in fact only, and not of right, when they are abroad. The jurisdiction, which a civil society has over the persons of its members, affects them immediately, whether they are within its territories or not. Both the parties therefore though they are out of the territories, are under the jurisdiction. As long as their claim to protection subsists, the jurisdiction of the society will subsist of right. And since, by the supposition of their being members of the same society both of them have a right to its protection ; civil jurisdiction can have ceased no otherwise between them, than as their

<sup>s</sup> Grot. *ibid.*



accidental situation may have rendered it impossible for the person, who is in danger of suffering the injury, to apply for protection against the aggressor to the civil magistrate.

But if they are members of different civil societies, they are not of right under the protection of the same civil society; there is therefore no civil jurisdiction, that can of right restrain the liberty of defence; the law of nature is the only restraint upon it: and he, who apprehends himself to be in danger of suffering an injury, seems to be the only judge, how far this law will justify him, in making use of his own force to prevent or repel it.

The only ground for supposing the society, of which the person, who defends himself, is a member, to have a right of restraining him, as to the occasion and manner of his defence, is, that they, against whom he defends himself, may under this pretence be injured by him; and they have a claim, as individuals in a state of nature, that this society should not make itself an accessory to the injury. <sup>1</sup> Amongst other ways, by which the society may be an accessory to what he does, one is by protecting him against them, after the injury is over. And since he, by the supposition, as a member of the society, has a claim to its protection; it does not appear at first sight how the society can consistently with his claim avoid being an accessory. The society may by this means be brought into great inconveniences, especially if they, who are thus injured, are members of another society, which will interpose in their quarrel, and call it to an account for what one of its members has done. The general good therefore seems to make it necessary, that every member of a society, merely as he is under its protection, should be subject likewise of right to its jurisdiction; without considering, whether those, against

<sup>1</sup> See B. I. C. XVII. § VI.

whom he defends himself, are under its protection or not ; that so the society, as it might be led into inconveniences by his claim of protection, may have a right to restrain him from acting at discretion even against aliens. But this conclusion proceeds upon a mistaken notion of a man's claim to be protected by the society, to which he belongs. He has only a claim to be protected in the enjoyment of his rights, and not a claim to be protected in whatever he does, whether it is right or wrong. The society therefore is not obliged to make itself an accessory, if under the pretence of defending himself, he has done them an injury : it is at liberty, as soon as this appears, to deliver him up to those, who have been injured by him ; if he is not willing to make proper satisfaction.

Where civil jurisdiction ceases of right, we have supposed the persons concerned to be out at sea, or in an uninhabited island, or in some place where no civil society is established : because if they are within the territories of any society, whether either of them are properly members of it or not, they have a temporary civil union with it and are under its protection. The society would not allow them to stay within its territories, or even to come thither, unless they agreed to conform to its laws, whilst they are there. They therefore by staying there, or by coming thither, are understood to consent to these terms, and by so consenting they make themselves temporary subjects. The society in the mean time, by suffering them to be there, is understood to accept them in this character, and consequently to give them a temporary right to its protection.

The general consequence, which follows from hence, is, that after mankind are united into civil societies, the law of nature forbids private war in any instance, and particularly duelling, which is one instance of private

war, even in one's own defence ; except where an injury which cannot be repaired, after it is over, is so near, that we cannot apply to the civil magistrate for the interposition of the society, which has both us and the aggressor under its protection ; or where the aggressor is in a state of rebellion or of civil war against that part of the society, which has us under its protection ; or lastly, where we and the aggressor are not within the territories of any civil society whatsoever. I call the obligation, which restrains us, an obligation of the law of nature ; notwithstanding it arises from civil union. For civil union is an act of consent ; and whatever obligation arises from our own consent is an obligation of the law of nature ; whether that consent is such as may leave us still in a state of nature, or such as joins us to a civil society, or at least places us for a time under its protection.

VII. In a state of equality, after an injury is committed, they, who have suffered any damage by it, are at liberty to make themselves amends, at their own discretion and by their own force : they are at liberty to take so much of the offender's goods, as is equal in value to what they have lost ; and the law of nature will give them property in the goods so taken. But in a state of civil society, if both the offender and the sufferers are under the protection of the same society, their right of obtaining reparation is restrained, and becomes subject to civil jurisdiction. The sufferers by having placed themselves under the protection of the same society, which is engaged to protect the offender, have consented, that as this society is to guard them against any causeless harm, which he might do them, so it shall guard him likewise against any causeless harm, which they might do him. And from this consent of theirs it acquires a right, to stop them from acting for

Right to  
reparation  
how sub-  
jected to  
civil juris-  
diction.



themselves, as they please; wherever such a liberty might be hurtful to him. These, as we have seen already, are the principles, from whence civil jurisdiction is derived, in respect of the right of private defence; and these are likewise the principles, from whence it is derived, in respect of the right, which individuals have in a state of equality, to obtain reparation for themselves. We may possibly pretend, that we have suffered some damage, when we have suffered none; or though some damage has been done, we may rate it too high; or though the offender is willing to make us amends, we may causelessly use force for obtaining it; or when he is unwilling we may use more force, and may do him more harm, than is necessary. But since the society has in consequence of our consent, a right to take care, that we do him no injury, under the notion of repairing our own damage: it has not only a right to restrain us from acting against him at all, upon this pretence, till it is satisfied, both that reparation is due to us, and what that reparation is; but a right likewise to restrain us, after this point is settled, from using any force, but such, as is under the conduct of the common understanding.

In the mean time, though a member of civil society is restrained in his right to obtain reparation, this right is not destroyed. He does not entirely lose his right to obtain reparation, he only loses his right to obtain it at his own discretion and by his own force: he is not obliged to submit to damage without redress; but is obliged, if he seeks redress, to seek it by the use of the public force, which is under the direction of the common understanding. He has still the right to obtain reparation, and the society, when it interposes, either by itself or by the civil magistrate to obtain reparation for him, interposes in his right, and not in its own.

VIII. Though civil jurisdiction in respect of the right of private defence may cease in fact, for the present instant only; yet in respect of the right of obtaining reparation by private force it cannot cease in this manner: if it ceases, so as to leave any person at liberty to act for himself, it must either cease in fact for some indefinite length of time, or else it must cease of right. Where an injury is coming upon a man, it is possible, that he may have no time to apply to the society for protection, but may be under the necessity either of defending himself or of not being defended at all. But after an injury is past, he cannot be well driven to these straits in regard to the obtaining of reparation for the damages, that have been done by it. He can scarce want time to apply to the society for this purpose: because, though defence might be useless, if it did not come at the present instant, yet reparation may be obtained at one time as well as at another. When the injury is over, he has leisure enough to seek redress; and the assistance of the society for obtaining reparation will be as effectual at some future time, as it would be now.

Civil jurisdiction in respect of reparation cannot cease in fact, for the present instant only.

⁂ Grotius mentions one case, which is in part an exception to these principles. He supposes the offender to be removing out of the territories of that society, which is to protect the sufferers, and to be carrying his goods along with him. In these circumstances, if they do not stop either him or his goods, it will hereafter be impossible for the society to do him justice. Civil jurisdiction therefore will so far cease in fact for the present instant only, as to leave them at liberty to stop either his person, or his goods, or both. But this does not come up to the right, which they had in a state of natural equality, of obtaining reparation by their own force and at their own discretion. The law of nature, in such a state of equality would not only have allowed

them to seize upon an equivalent out of his goods, but would have given them property in such equivalent. Whereas in a state of civil society, the same law, in consequence of their own consent, will not allow them to act for themselves, when they can have recourse to the civil magistrate. Since therefore, after they are in possession of the goods, they will have leisure enough for this purpose; however they may be at liberty to seize upon the goods, they are not at liberty to use them as their own; till they are adjudged to be their own by the civil magistrate; civil jurisdiction may so far cease, as to give them a right to take possession; but it will not so far cease as to give them a right to keep possession: they may seize upon the equivalent; but it is the civil magistrate that must give them property in it.

Civil jurisdiction, according to the opinion of Grotius, ceases in fact for some continuance of time, when we are satisfied in our own mind of our right to reparation, but are morally certain, that we cannot recover reparation by the sentence of the magistrate; because we are not able to prove the injury or the damage in such a manner, as the laws of the society require. But the contrary opinion seems to be the more probable. A right, which does not appear to the society, is in respect of the society no better, than a right, which does not exist. All the harm, that we do to those, who are under its protection, in support of such a right, must in the judgment of the society be so much causeless harm. They therefore by their civil union have a right to be protected against this harm; and consequently we by our civil union with the same society have given up our right to do it.

What has been said already concerning private defence, may easily be applied to reparation for damages, where civil jurisdiction ceases of right.



IX. If we ask how the right of punishing, which every individual had in a state of nature, comes to be restrained in a state of civil society; the usual answer is, that the several individuals have transferred this right from themselves to the civil magistrate. But this answer does not take the matter up high enough. The civil magistrate in a civil society is the executive body, which is appointed to act for the collective body of it under the restraints of the law. And if the civil magistrate is appointed to act for the society, we must necessarily conceive the society to be in existence, before the appointment of such magistrate. The first social compact unites a number of independent individuals into one body by binding them to act together for certain purposes. In such a perfect democracy, as would arise from this compact, all the members are equal to one another: there is no particular executive body, consisting of one single person or of a select number of persons, which has any authority to act for the rest. The question therefore is, how the right of punishing, which individuals had in a state of nature, comes to be restrained in such a society as this? And in this view, it will evidently be an unsatisfactory answer to say, that the several individuals have transferred their right of punishing to the civil magistrate; because there is no such thing as a civil magistrate, to whom they could transfer it. If we think to correct this answer by saying, that they transfer their right of punishment from themselves to the society; such a correction will only serve to make it unintelligible. \* Each individual, who is a member of the society, would, in a state of nature, have had an equal right of punishing with the rest: for this right is not confined to that individual in particular, who has been injured by the crime, but extends alike to all mankind. The society therefore being nothing else but an aggregate body of individuals, who have each of them a natural

Right of  
punishing  
how re-  
strained  
by civil  
jurisdiction.

\* See B. I. C. XVIII. § VIII,

right of punishing ; a transfer of this right from themselves to the society is nothing else but a transfer of it from themselves to themselves.

The restraint upon the right of individuals, to punish a criminal separately, is produced by civil union, in the same manner with the restraint upon the rights of private defence, and of obtaining reparation by private force. If any person, who is under the protection of a civil society, is charged with having committed a crime, the society is obliged to take care that he is not injured under the notion of punishing him. An individual, who undertakes to inflict the punishment by his own private force and at his own private discretion, may possibly pretend, that a crime has been committed, when nothing at all, or at least nothing criminal, has been done ; or he may rate the guilt of a crime too high ; or he may inflict a greater penalty, than the guilt deserves. Upon any of these suppositions, the person, who is charged with a crime, and who perhaps has actually been guilty of one, would be injured by the punishment, that is inflicted. The society therefore, which has engaged by the social compact to protect him, is obliged to stop the punisher from proceeding, and to take the matter into its own hands. If the punisher is not under the protection of the same society with the offender ; this society acts, in respect of the punisher, no otherwise, than any individual might have done in the liberty of nature : any individual, who thought, that the offender was likely to be injured, was at liberty to interpose and to protect him against the injury. In respect of the punisher, all the difference between a society, with which he has no connection, interposing in behalf of the offender, and an individual in the liberty of nature interposing for the same purpose, is, that the society is stronger than an individual, and will therefore be bet-

ter able to take care, that no injury shall be done. In respect of the offender indeed, there is a farther difference ; for in the liberty of nature, he had no claim to be protected from injuries by any individual ; but civil union gives him such a claim upon the society, which has taken him under its protection. But if this interposition of the society depends in respect of the punisher, upon the same principles with the interposition of an individual in a state of nature ; the restraint, that arises from hence, upon his liberty of punishing separately, is a restraint rather in fact than of right : he is still at liberty to punish the offenders, if he could, and only gives up this liberty, because he cannot help it. But suppose the punisher to be under the protection of the same society with the offender ; the restraint in fact upon his liberty of punishing separately, will then become a restraint upon it of right. By placing himself under the protection of this society, so as to acquire a claim to its protection, he must necessarily be understood to have given his consent, that the offender should be protected by it, as well as he : because the society, standing engaged to protect the offender, could not receive him under its protection upon any other terms. Now the protection of the offender consists in the interposition of the society to stop the punisher from acting separately, and to take the matter into its own hands : and since the punisher by his civil union with the society has consented to this ; he has by such consent given up his liberty or his right of punishing separately. What has been said of any one individual, whom we have here called the punisher, may be applied to every other individual, who is connected with the society by civil union. And thus notwithstanding each of them, in a state of natural liberty, had a right of punishing a cri-



minal separately by their own private force and at their own discretion ; they cease by their own consent to have such a right, when they are united into a civil society, in respect of any criminal who is a member of their body, or is under the protection of the same society with themselves.

From this account of the effect, which is produced by civil union upon the right of punishing, it appears, that there is no occasion to enquire, how the society acquires this right, when the individuals lose it. For in fact the right of punishing, which individuals had in a state of nature, is not lost, but restrained, by civil union. In the liberty of nature each had a right of punishing separately : civil union only restrains them from punishing separately : and consequently they have still the same right of punishing, after they are thus united, that they had before ; except only, that they have agreed, if they exercise it at all, to exercise it together. And thus the right, which the society, consisting of a number of individuals, has to punish, appears at last to be nothing else but the joint right of all the individuals.

Difference  
between  
jurisdiction  
in mat-  
ters of da-  
mage and  
of punish-  
ment.

X. Both the right of obtaining reparation and the right of inflicting punishment arise out of an injury, and are brought in the same manner under civil jurisdiction. But there is one material difference between these two rights in a state of nature, which makes a difference in a state of society between the jurisdiction of the society in matters of reparation, and its jurisdiction in matters of punishment.

When an injury has been committed in the liberty of nature, the only person, who has a right to reparation, and to make use of force for obtaining it, is the person, who has suffered damage by the injury. Others, who chuse to give him their assistance, are

then only at liberty to give it, if he asks for it, or if they see that he wants it. As on the one hand he cannot compel them to assist him, so on the other hand, if he waves his right either expressly or tacitly, either by declaring openly, that he does not require any reparation, or by sitting still and not endeavouring to obtain any, they have no right to take the quarrel upon themselves of their own accord and to enforce reparation for him. The reparation was due only to him: if therefore he gives it up, it is due to no body else; that the offender stands clear of all demands; and whatever they may take from him, under the notion of obtaining reparation for the sufferer, it will be taken from him unjustly. The consequence of this, in civil societies, is what we have just now hinted at: though he is restrained by civil union from obtaining reparation by his own force, and at his own discretion, yet the right to obtain it is still his: he is obliged indeed, if he seeks it at all, to seek it by the public force under the direction of the common understanding: but the society interposes with this force in his right, and not in its own.

When a crime has been committed in the liberty of nature, the right of punishing the criminal is not confined to the person, who has been hurt by the crime: every individual has the same right, that he has, to correct or restrain such a bad disposition, as may be hurtful to any of them hereafter, if it is not corrected or restrained; that is, every individual has the same right, that he has, to punish the criminal. The consequence of this is, that though in a state of civil society, each individual, who is a member of such society, is restrained by civil union from punishing a criminal separately by his own force, and at his own discretion, yet each and all of them have still the right of punishing jointly, by the public force and under the conduct

of the common understanding. The society therefore, when it inflicts punishment, inflicts it in the right of all the individuals, that compose such society: or since the society is nothing else but the aggregate body of all these individuals, we may say, that the society inflicts punishment in its own right, or as it is more usually expressed, in the right of the public.

From hence it appears, why the same injury, when it is considered as doing damage, should be called a private offence, and when it is considered as a crime, should be called a public offence. It is called a private or a public offence in reference to the person, who is offended by it, and has a right to take notice of it. When therefore it is considered as doing damage, it is called a private offence; because the reparation is due to some one or more private persons. But when it is considered as an evidence of a hurtful disposition, it is a public offence; because it gives the society, which is a public person, a right to punish the offender.

I have here called the jurisdiction, which a civil society has both in matters of private and of public wrong, by the general name of civil jurisdiction. \* Though it is, I believe, more usual, to call only its jurisdiction in matters of private wrong civil jurisdiction; and its jurisdiction in matters of public wrong criminal jurisdiction.

From hence likewise it appears, that after a man has been proved to have done any damage, and the public is satisfied both of the fact and of the reparation, which is due for it; there is no right in the society to remit such reparation: because it is due to the individual, who has suffered the damage, and not to the society. But after it has been proved in like manner, that a man has committed a crime, the society has a right to pardon him or to remit the punishment; because the



punishment is not due to any individual in particular, but to all of them equally, that is, to the society itself.

XI. Now we have seen, how the right of individuals to punish separately is restrained in a state of civil society, and by what means the right of punishing is vested in the collective body of the society; it will be no difficult matter to understand, how it comes into the hands of the civil magistrate. By the civil magistrate is here meant the supreme executive body of the society; whether it consists of one or of more persons acting under the checks and controls of the legislative. Indeed we commonly take into our notion of the civil magistrate not only the supreme executive body, but likewise all other persons, who have any jurisdiction. However, as inferiour magistrates have only a jurisdiction derived from the supreme executive body, it is not necessary to enlarge the definition of the civil magistrate in order to include them in it. As the first social compact restrains the several members of a civil society from punishing a criminal separately, and vests the right of punishing in the society itself, that is, in all the members acting jointly; so when it is farther agreed to establish any particular executive body, or civil magistrate, the right of punishing, which was before vested in the whole society collectively, is vested by this agreement in such executive body. A transfer here may be so explained as to be intelligible enough. For though the several individuals could not in the first act of civil union be understood in any sense to transfer their natural right, of punishing separately, to the civil magistrate, because the first act of civil union does not establish any civil magistrate; yet the society, after it is formed, or all the individuals, after they are united into one collective body by the first social compact, may, if we like the expression, be said to transfer the

Right to  
punish  
how vested  
in the civil  
magis-  
trate.

social right of punishing collectively to the executive body: only we should observe, that this transfer consists in nothing else, but in the societies having made a standing appointment of an executive body to act for it with the common force in matters of punishment. In like manner, though the several individuals could not be understood in any sense to transfer the right of punishing from themselves to the society; because this would only be a transfer of it from themselves to themselves; yet we may say, that the society transfers the right, which it has to punish collectively, to the civil magistrate, that is, to some part of the collective body: if we think, that a standing appointment of this part, to act for the whole can properly be called a transfer.

But it is to be observed, that an executive body, whether it consists of one person or of more, has not the full liberty or right of punishing, which the collective body had, unless the legislative power is delegated to it, as well as the executive power. All punishment in a state of civil society is to be inflicted by the common force under the direction of the common understanding. If the society therefore punishes in its collective body, it acts under no external restraints, but may punish or pardon according to its own discretion, by which I mean its own judgment of right and wrong; because the common understanding, as well as the common force, is in the keeping of the collective body. In like manner, if the same person, or the same select body of persons, to whom the executive power is committed, should be entrusted likewise with the legislative power; such an establishment would give this person, or this body of select persons, as absolute a power in matters of punishment, as the law of nature and the purposes of civil power can allow of. <sup>2</sup> But if the executive body has only the executive power, which is all that the

<sup>2</sup> See B. II. C. § IV.

name of such body imports; it is under the restraints of the law, and can only punish under the directions of the legislative body: because the common understanding of the society speaks by its legislative body; whether that legislative is the whole collective body of the society, or some select part of it, to which the legislative power is committed. Nay, if the executive body has nothing else entrusted to it, by the constitution, besides executive power; as it could not punish, so neither could it pardon at discretion: for the executive power in itself is not a discretionary power in any respect, but is either to act or not to act, as the common understanding speaking by the laws directs it. When therefore the constitution of government allows the civil magistrate or executive body to have a discretionary power of pardoning; this is considered as something distinct from mere executive power, and is called prerogative.

But though the executive body acts under the restraints of the law; yet it is appointed, in matters of punishment, to act with the common force, instead of the society. In consequence of civil union all the individuals act jointly, that is, the society acts with its public force, in matters of punishment, for the common security of all its members. But in consequence of the establishment of an executive body, this body acts with the public force for the same purpose. All crimes therefore, where such a body is established, may be considered as offences against the executive body in particular: because they are inconsistent with the common security, which this body is to guard and maintain with the public force of the society.

XII. <sup>a</sup> Grotius seems to be of opinion, that civil jurisdiction cannot cease in fact, for the present instant, in matters of punishment. Mankind in a state of society are at liberty to defend themselves by their own

How far  
civil jurisdiction  
may cease  
in respect  
of the  
right to  
punish.

<sup>a</sup> L. II. C. XX. § VIII. IX.



private force against an injury, which is so near at hand, as not to allow them time for applying to the civil magistrate to defend them. But though defence at the present instant may be necessary; there is not the same immediate necessity for punishing a criminal: punishment will answer the ends, that are proposed by it, as well if it is inflicted some time hence, as if it was to be inflicted just now. There seems therefore in matters of punishment to be always leisure enough for applying to the civil magistrate. It may be said in reply, that, if the criminal is making his escape, there may possibly be no opportunity at all of punishing him, unless the present opportunity is made use of. When we have been robbed of our money or our goods, and the criminal is going away, so that we are in no danger of suffering any other harm at present, than what he has done already; if any thing can justify us in killing him with an arrow or a pistol, it must be either the purpose of obtaining reparation for what we have lost, or the purpose of punishing him, to prevent his doing the like mischief hereafter either to ourselves or to others. The mere taking away his life cannot come within the notion of reparation any otherwise, than as we may suppose it to be the only possible means of getting our money or our goods again, when he is going away with them. And it is most probable, if we are asked, why we killed him, that, instead of taking notice of the reparation due to us for the damage, which he had done, we should say, that we did it in order to take a dangerous man out of the way, and to prevent his doing any farther mischief. If this is the answer, which the common sense of mankind would suggest to them upon this occasion; it is plain, that in the judgment of mankind, the death of the criminal in these circumstances is intended as a punishment: for the notion of punishment

consists in making a person, who has shewn a hurtful disposition by some harm already done, suffer such evil, as will prevent his doing the like again.

But supposing it to be true, that, where civil jurisdiction thus ceases, the members of a civil society would be at liberty to punish one another separately; if they were under no other restraint, but what arises from civil union yet they may be still farther restrained by civil laws. And such laws would be reasonable upon account of the likelihood, that this liberty might be abused: they might pretend, that they punished the criminal by their own private force, because they found it impossible to call in the civil magistrate, when perhaps no crime was committed, which deserved punishment, or at least, when they might have had the assistance of the civil magistrate, if they had chosen it.

We may observe by the way, that no person can inflict any punishment less than death by his own separate right, under the notion of a failure of civil jurisdiction in fact for the present instant. For if the punisher had the criminal so much in his power, as to be able to chuse what sort of punishment he would inflict; he certainly had an opportunity of applying to the civil magistrate, and consequently civil jurisdiction did not cease. But whoever ventures to punish a criminal with death, upon a supposition, that civil jurisdiction does cease; ought to be well assured, that the crime deserves death: for if it does not, however the laws of his country might acquit him of murder, he could not acquit himself of it in his own conscience.

Where civil jurisdiction ceases in fact for any length of time, as it does when the subjects are in a state of rebellion; those, who are in such state, are not under the protection of the public: and though a man may be restrained by civil laws from punishing them for any crime, which

they commit, yet, if we look no farther than the obligations arising immediately out of civil union, he would be at liberty to punish them.

Where civil jurisdiction fails of right, the natural liberty of punishing is governed by the same rules with the natural liberty of defence or of obtaining reparation for damages. And as these rules have been already explained at large, it is needless to repeat them here.

Natural principles applicable to social punishment.

XIII. The reader will now perceive of what use it is to trace out, as we did in the former book, the natural principles of punishment amongst individuals in a state of equality ; <sup>b</sup> to point out the ends, which punishment has in view ; and the reasons which justify it ; to mention the rules, that are to be observed in capital punishments ; to determine the nature of those actions, which are punishable ; to explain the notion of guilt, and the manner of estimating it ; to settle the proper measure of punishment ; to shew upon whom it may, and upon whom it may not, be inflicted ; and by what means, when it is inflicted upon the ancestor, it may affect the heir, notwithstanding the heir could not justly be punished for the crime of the ancestor. For though, when we were tracing out those principles, we applied them to mankind, considered as individuals in a state of equality ; yet the principles themselves extend farther, and may be applied to mankind, considered as united into civil societies. The right which a society has to punish its members, whether it exercises this right by itself or by its civil magistrate, is nothing else but the joint right of all the individuals, that make up the society. Whatever therefore are the principles, by which the law of nature requires an individual to guide himself, when he punishes by his own private force, and at his own discretion ; the common understanding of a civil society is to be guided by the like



principles, when it punishes either by itself, or by its civil magistrate.

XIV. We make a wrong application of the principles, by which the law of nature requires individuals to guide themselves in matters of punishment, when we conclude, that no actions are punishable by mankind, after they are united into a civil society, but those only, which are punishable by individuals in the liberty of nature. In one sense indeed this rule will hold good. All actions, which are punishable by a civil society, or by the civil magistrate of such society must be of the same sort with those, which are punishable by individuals acting separately and independently; that is, <sup>c</sup> as none but unjust actions are to be punished in a state of nature, so none but unjust actions are to be punished in a state of civil society. But when the rule is thus expressed, we cannot infer from it, that the civil magistrate has no right to punish any other actions, besides those, which independent individuals have a right to punish separately: unless it could first be shewn, that no actions can be unjust in a state of society, besides those, which are unjust in a state of nature. All actions, which do harm, and by the harm, which they do, are an evidence of a hurtful and dangerous disposition in the person, who commits them, are crimes. The hurtful or dangerous disposition of the criminal is his <sup>d</sup> guilt, and makes it just to punish him, that is, to inflict some evil upon him, which may correct or restrain that disposition in order to secure mankind against his doing the same or the like harm for the future. If therefore any actions, which, in a state of nature, would have done no harm to mankind, become hurtful to them in a state of society; such actions, though they do not make it just for individuals, acting separately, to punish the doer of them, will

Actions, not punishable by individuals, may be punishable by magistrates.

<sup>c</sup> See B. I. C. XVIII. § IX.

ibid. § X.

make it just for a society, or for the civil magistrate to punish him.

Perhaps we may see the truth of this reasoning more clearly in the case of reparation, than we do in the case of punishment. The natural rule of reparation amongst separate individuals is, that no reparation is due, where no damage has been done. And the rule amongst the members of a civil society is the same. But we cannot conclude from hence, that there is no reparation due, amongst the members of a civil society, in any instance, but where it would have been due amongst separate individuals. Mankind in a state of civil society acquire many strict or perfect rights, which they had not in a state of nature: such actions therefore may do damage amongst the members of civil society, as would have done no damage amongst separate individuals. The natural rule is the same in both cases; but it is different in its application: in a state of society, as well as in a state of nature, no reparation is due; unless some damage has been done: but many actions may be attended with an obligation to make reparation in a state of society, which were not attended with such an obligation in a state of nature.

It may be further said, that separate individuals cannot punish any thing besides natural injustice. But if we enquire what is meant by natural injustice, we shall find, that the words admit of three senses; in the first sense this principle is not true; in another sense, the reason, why nothing else is punishable by mankind, when they are considered as separate individuals, does not extend to them, when considered as members of a civil society, and consequently this principle, though it is true, will be nothing to the purpose; and in a third sense of the same words, we may reduce whatever is punishable by the civil magistrate to the notion of natural injustice, though we contend at the

<sup>c</sup> See B. I. C. XVII. § III.

same time, that the magistrate has a right to punish many actions, which were not punishable, or which even could not exist, in a state of nature.

Natural injustice, in its most proper and strict sense, signifies the doing harm to mankind by violating what are strictly and properly called 'their natural rights, that is, such rights as belong to mankind originally by the gift of nature without the intervention of any human act, their rights, for instance, to life, to liberty, to freedom from pain &c. In this sense of the words — *natural injustice* — it is not true that nothing else is punishable by individuals in the liberty of nature. The law of nature forbids the violation of their adventitious rights, as well as of their natural rights, and allows them equally to secure the enjoyment of their rights of either sort by punishing any person, who by having done harm already, in respect either of their strictly natural or of their adventitious rights, has shewn, that he is disposed and is likely to do them harm again; if he is not corrected or restrained. Unless the right of punishing, as it subsists amongst individuals in a state of natural liberty, extended to the violation of their adventitious rights; it would not be lawful for separate individuals to punish theft; because theft is a violation of property, and the right of property is of the adventitious, and not of the strictly natural sort.

But suppose we enlarge the meaning of natural injustice, and understand by it not merely the violation of what are strictly called natural rights, but the violation of any rights, whether original or adventitious, which are sometimes in a larger sense called natural rights, as belonging to mankind in a state of nature. In this sense it is true, that separate individuals cannot punish any thing besides natural injustice. But their

<sup>f</sup> See B. I. C. II. § VIII.

<sup>g</sup> See B. I. C. III. § II. VII.



right to punish even this is founded merely in its being injustice, and not in its being precisely natural injustice. And consequently if any other sort of injustice, besides what is called natural, was possible amongst individuals in a state of nature, they would have the same right to punish this other sort; because this likewise, though it was not natural injustice, would however be injustice. The reason therefore, why they can only punish natural injustice, does not depend upon the nature of the right to punish, but upon the particular situation and circumstances of the punishers: they cannot punish any thing, besides natural injustice; because, in their particular situation and circumstances, no other sort of injustice can exist. But if the reason, which restrains their right of punishing to natural injustice only, depends upon their situation and circumstances, and not upon the nature of the right itself; the principle here laid down, that individuals in a state of natural liberty can punish nothing else, besides natural injustice, will be little to the purpose, when it is alleged as an argument to prove, that the same individuals can have no right to punish any other sort of injustice, after they are united into a civil society. For in civil society their situation and circumstances are so altered, that another sort of injustice, besides what is here called natural, becomes possible. The cause therefore, which in a state of nature restrained punishment to natural injustice, is then removed. It was before a restraint in fact and not of right; they could not punish any injustice, besides natural injustice; not because no other act of injustice is punishable upon the same grounds, that natural injustice is, but because no other sort of injustice could exist. When therefore, by the introduction of civil society, another sort of injustice becomes possible; the restraint, that there was

in fact upon their right of punishing before, is taken off; and this other sort of injustice becomes punishable upon the same principles of the law of nature, which gave them in a state of equality a right to punish natural injustice. This other sort of injustice may be called social injustice, which, as far as it can be distinguished from natural, consists in doing harm to mankind by violating any rights, which belong to them in a state of civil society, and are different from the rights, which belonged to them in a state of nature. Mankind in a state of nature have a right to punish any person, who has designedly and maliciously committed any injustice; because the law of nature, when they have suffered causeless harm from him already, and find from thence, that he is disposed to do them future harm, allows them to guard against such future harm, by correcting or restraining him. This principle of the law of nature extends to social injustice, and is not confined to natural injustice: because one sort of injustice does harm to mankind, as well as the other; and the law of nature no more forbids them to guard themselves against one sort of harm, than it forbids them to guard themselves against the other.

Natural injustice, in a third sense of the words, may mean the violation of any right, which is under the protection of the law of nature, that is, any right of which the law of nature forbids the violation. In this sense individuals in the liberty of nature have certainly no right to punish any thing else, besides natural injustice: and we may grant too, that a civil society or a civil magistrate has no right to punish any thing else. But it will be no consequence, that the society, or the civil magistrate for the society, has not a right to punish many actions, which were not punishable by separate and independent individuals. For the social rights

of mankind are, in this sense of the words, as much natural rights, as any that belonged to them originally by the gift of nature, or as any that belonged to them either originally or adventitiously in a state of nature. All their social rights are acquired consistently with the law of nature: they are acquired by consent either express or tacit, either direct or implied: and <sup>h</sup> all rights, which are so acquired, are equally under the protection of the law of nature; because this law equally forbids the violation of any of them.

It is a crime for any man, who is a member of a civil society, to join with the enemy in time of war and to fight against that society. But if we confine the notion of natural injustice to the violation of such rights, as belonged to mankind in a state of nature, this, though we call it a crime, cannot be an act of natural injustice: for it is so far from violating any such right, that in a state of nature, the act itself would be impossible. No man can fight against the society, of which he is a member, when he is not a member of any society at all. The social injustice of the act is what makes it criminal: the society, when he became a member of it, acquired, by his own consent, a right to his assistance towards securing and advancing the general good: and to join with the enemy in fighting against it is a violation of this right. In one sense indeed this is an act of natural injustice, and in such a sense, as will make it punishable upon principles of the law of nature. Though it is not a violation of any right, which belonged to mankind in a state of nature, yet it is a violation of such a right, as was acquired agreeably to the law of nature, and is under the protection of this law. What has here been said concerning one instance of treason, will be applicable to many other instances; the crimes, which are ranked under this head, consist in such acts, as were impossible,

<sup>h</sup> See B. I. C. II § VIII.



and therefore could not be punishable, in a state of nature. But he would in the mean time be thought to maintain a doctrine very unreasonable in itself, and very destructive to his country, who should contend, that treason is not punishable in a state of society, because it is not a violation of any right, which subsists in a state of nature.

Where a man has wool produced by his own sheep; he would in a state of nature be at liberty to carry it to any place, that he pleased; and to sell it to any persons, that he pleased. This liberty is not restrained merely by the act of social union; he may be a member of a civil society, and yet be at liberty to carry his own wool to a foreign market, and to sell it there to foreigners. This is no act of natural injustice, in one sense of the words; because it is no violation of any right, that belonged to mankind in a state of nature. And it is no act of social injustice by any immediate effect of the social compact. When we consider the owner of the wool, as a member of any civil society, the society has indeed a right, in consequence of the social compact, to hinder him from disposing of his wool in such a manner as appears to the common understanding to be hurtful to the public. But whether the selling of it to foreigners will be hurtful to the public, or not, in the judgment of the common understanding, appears only by the laws. He will therefore continue at liberty to sell it to whom he pleases; as long as the laws of his country are silent upon this head. But as soon as these laws have forbidden him to sell it to foreigners; such selling becomes an act of social injustice; and the society will upon the principles of the law of nature have a right to punish him for it. I say upon the principles of the law of nature; because the law of nature leaves all the members of the society acting jointly, that is, it leaves the so-

ciety itself, or the civil magistrate acting in its stead, at liberty to punish any person, who designedly does causeless harm; whether that harm affects mankind in such rights, as were the original gift of nature, or in such, as were acquired in a state of nature, or in such, as were acquired in a state of society agreeably to the law of nature.

Drunkenness, lewdness, prodigality, and idleness do harm only to the vicious themselves, and no harm to others, when mankind are considered as separate and unconnected individuals. <sup>i</sup> They are therefore such crimes, as mankind are not at liberty to punish in a state of nature. These vices may, and most probably will, lead men to some act of natural injustice; and when they do, though this act is punishable, yet still the vices themselves, as no natural injustice is included in the notion of them, are only the remote occasion of the punishment. But in a state of society it is otherwise. As the compact, which unites mankind into a civil society, binds all and each of the members on the one hand to advance the general good, in such a manner as the common understanding shall prescribe, so it gives the society on the other hand a right to demand this of all and each of the members. When the laws therefore, in view to the general good, have forbidden these vices, they become matter of social injustice; and the society has a right, upon the principles of the law of nature, to punish those, who are guilty of them.

In like manner offences against God, though they are <sup>k</sup> not objects of human punishment in a state of nature, may be punished by the civil magistrate in a state of society. When we consider mankind as separate individuals, there is no natural injustice towards mankind included in these offences. But when the same offences appear to the common understanding of a civil society,

<sup>i</sup> See B. I, C. XVIII, § IX.

<sup>k</sup> *ibid.*

either to dissolve the bands of civil union, or to obstruct the general good by making men loose and profligate in their manners ; the society has a right to forbid them : and when they are so forbidden, they become matter of social injustice, and are punishable by the civil magistrate. And certainly if such actions, as are in all respects indifferent amongst separate individuals, not only as they do no harm to mankind, but likewise as they are not forbidden at all by the law of nature, become punishable in a state of society, when the civil laws of the society have forbidden them, in view to the general good ; there is no reason to imagine, that atheism, blasphemy, profaneness, and irreligion, are so far sanctified by being in their own nature offences against God, as to exempt them from civil penalties, when they are forbidden by the civil law with a like view to the general good.

<sup>1</sup> Grotius doubts, whether in any instances the want of benevolence is punishable by man. In a state of nature it certainly is not punishable for reasons, which are something different from those assigned by our author. These reasons have already been explained at large in their proper <sup>m</sup> place. And if we were disposed to allow any weight to our authors argument in favour of his own opinion, when mankind are considered as individuals ; it has certainly no weight at all, when we consider them, as united into a civil society. Those vices, he says, are not to be punished by men, whose opposite virtues cannot be produced by constraint, such as gratitude, liberality, compassion, and kindness. When he says, that liberality cannot be produced by constraint, I suppose him to mean, that force or fear, though they may make a man give his money away, cannot make him liberal ; because liberality implies, that he is led to

<sup>1</sup> L. II. C. XX. § XX.

<sup>m</sup> ibid § IX.



give it away by a disposition to do good. In the like sense it may be said, that force or fear cannot make a man grateful; not because punishment, when it is either threatened or inflicted, cannot influence him to make suitable returns to his benefactors; but because no returns, which arise from constraint, and not from the good disposition of his own mind, can be called gratitude. The fear of punishment may likewise induce a man to assist those, who stand in need of his assistance: but Grotius would not call the good, which he does, for fear of being punished, if he was to do otherwise, by the name of kindness; because it does not arise from the benevolent disposition of his heart.

Now supposing it for the present to be true, that neither actual punishment nor the fear of punishment can produce those virtues; the only consequence is, that punishment, when it is either inflicted or threatened, in order to produce them, will be of no benefit to the person, upon whom it is inflicted, or against whom it is threatened. What he has suffered already, or what he may be afraid of suffering hereafter, cannot produce these virtues in him, so as to make him a better man. But in the mean time, though such punishment should happen to be of no benefit to the vicious man himself, it may be of great benefit to others, by making him a more useful member of society, whether he will or not. Though it cannot produce the virtues themselves, it may produce the outward effect of them. Suppose for instance, that punishment cannot make a man liberal, yet certainly it may force him to give what he can spare, from his own expences, to those, who are in need; and it may force him likewise to spare more from his own expences, than he otherwise would have spared. The naked may be clothed, and the hungry may be fed with his superfluities, not only when he is led to dispose of them for

these purposes by the good disposition of his heart, but when he is constrained thus to dispose of them by the fear of punishment. Suppose, that punishment cannot make a man grateful; it may however secure a return of what will be as beneficial to those, who have done him favours, as if he had been led to make the return by his own virtue. Now the justice of punishment in those instances, where no one questions its consistency with the law of nature, does not depend upon the benefit, which the criminal receives from it. " The primary end of it is to change his outward behaviour for the security of others: and this end is what makes it just to punish him; whether the punishment produces such a change by mending his inward disposition, or by making him afraid to offend again. If therefore the law of nature allows mankind to punish acts of injustice, notwithstanding such punishment, whilst it corrects the outward behaviour of the criminal, may fail of correcting his heart; the supposed impossibility of producing inward benevolence by punishment can be no reason, why the law of nature should not allow mankind to punish acts of inhumanity, inclemency, or ingratitude.

But what has been hitherto supposed is not universally true: we cannot grant, that the fear of punishment can never produce a benovolent disposition. Punishment perhaps may in the first instance seldom be attended with this effect: but it is not improbable, that what a man is constrained to do, in the first instance through fear, may in time and by use grow habitual to him. His bad disposition, when it has long been kept under by such constraint, may at length be corrected: and thus the punishment or the fear, which at first produced only the outward effects of benevolence, may by degrees produce the virtue itself. The common consent of mankind favours this opinion. Parents

<sup>n</sup> See B. I. C. XVIII. § III.

act upon it, when they discourage or correct their children for such instances of behaviour, as betray a want of gratitude, or liberality, or tenderness. They hope by such discouragement or correction, not only to restrain the outward behaviour of their children, but to bring them by degrees to a better temper of mind.

However, neither the design of producing the outward effects of benevolence for the benefit of mankind, nor the design of amending the disposition of the vicious for their own benefit, will be sufficient to give individuals a right of punishing the vices, that are opposite to this virtue. For though the reason here alledged by our author does not prove, that they have no such right; it has been elsewhere proved by other reasons. We can have no right to make a man suffer for not doing what we have no right to demand of him; however reasonable it might be for us to expect it of him.

But what is matter only of imperfect right or reasonable expectation amongst individuals in the liberty of nature, may become matter of perfect right in a state of civil society. A contract, even in the liberty of nature, will give us a right to a thing, which was not our own before: whoever withheld the thing from us, before it was made our own by some compact, might perhaps be chargeable with wanting kindness: but whoever takes it from us, or withholds it afterwards, is chargeable with injustice. This is the effect of compacts in general, and an effect of the same sort may be produced by the social compact in particular. All the members of the same civil society bind themselves, by this compact, to do whatever the common understanding, speaking by the laws, shall direct them to do, in order to advance and secure the general good. And consequently, whatever outward acts of benevolence the law prescribes, they become due of perfect right to the



several individuals, who are the objects of those acts : not to do that good, which the law requires to be done, is to withhold what is no longer matter of favour, but of strict justice. When the want of natural benevolence, in any particular instance, is thus become social injustice by means of civil laws, which are founded in the social compact, that is, in our own consent ; such want of benevolence, though it was not punishable by individuals in a state of nature, will upon the principles of the law of nature be punishable by the civil magistrate in a state of society.

## C H A P. VI.

## Of civil laws.

- I. *Difference between a civil law and a compact.* II. *Civil constitutions established partly by law and partly by compact.* III. *Internal and external obligation of civil law.* IV. *A civil law obliges internally, when it is made and promulgated.* V. *The sanctions of civil law produce its external obligation.* VI. *Penal sanctions not essential to civil laws.* VII. *Proper matter of civil laws.* VIII. *Matter of natural right and wrong may be matter of civil law.* IX. *Civil laws not confined to matters of natural right or wrong.* X. *Rights of mankind may be changed by civil laws.* XI. *Effect of civil laws on promises, contracts and oaths.* XII. *What obligation to perform a void promise, contract or oath.* XIII. *Effect of civil laws on the promises, contracts, or oaths of kings, who have legislative power.* XIV. *Effect of civil laws on marriage.* XV. *Civil laws are written or unwritten.* XVI. *Unwritten laws how established.* XVII. *Unwritten law more difficult to be ascertained than written law.* XVIII. *Unwritten laws how repealed.* XIX. *Written laws cannot be repealed by prescription.* XX. *General division of civil laws.* XXI. *In some constitutions the civil laws of succession to the crown cannot be fundamental laws.* XXII. *Controverted succession may be settled by civil laws.*

Difference  
between a  
civil law  
and a com-  
pact.

- I. **W**HEN we consider only the general notion of a law, there appears to be a plain difference between positive laws and compacts. <sup>a</sup>A compact is an act of two or more persons, which produces an obliga-

<sup>a</sup> See B. I. C. XIII. § I.

tion upon those, who make themselves parties to it, by their own immediate or direct consent. <sup>b</sup> A law is an act of a superiour, which obliges all, who are under his authority, as far as they are concerned in the matter of the law and as far as the legislator intended to oblige them; whether they immediately and directly consent to it or not.

But the superiority of a civil legislator, that is, the right, which a civil legislator has to prescribe laws to the members of a civil society, arises from their own consent: and consequently, whatever difference there may be between a positive law and a compact, when we consider only the general notion of a positive law; the difference between a civil law and a compact is less apparent: because the obligation <sup>c</sup> of civil laws, as well as the obligation of compacts, arises from the consent of those who are obliged by them. The mark of distinction between them consists in the different sort of consent from which their obligation arises. No person is obliged by a compact, besides those, who make themselves parties to it by some immediate or direct act of consent. But all persons are obliged by the laws of a civil society whether they make themselves parties to them by any immediate and direct consent, or not; if they have only made themselves parties to them by a remote or indirect consent. When a society is formed for the sake of carrying on some certain purpose, whether it is a civil society or a society of any other sort; the several <sup>d</sup> individuals, who join themselves to it, either consent expressly, or by the act of so joining themselves to it, are understood tacitly to consent to the carrying on this purpose by such measures, as the common understanding shall approve and prescribe.

<sup>b</sup> See B. I. C. I. § V.

<sup>c</sup> B. II. C. III. § I. B. I. C. X. § III.

<sup>a</sup> See B. II. C. I. § II.

Grot. Proleg. XV.



Now the purpose, for which a civil society is formed, is the general security and the general interest of the whole and of its several parts. Every man therefore, by consenting to make himself a member of a civil society, agrees immediately or directly, that these purposes shall be carried on, and that he will concur in carrying them on, by such measures, as the common understanding of the society shall approve of and prescribe. Thus far he is engaged only in a compact, which obliges him by means of his own immediate or direct consent ; and without such immediate or direct consent he would be no party to it, nor be any ways concerned in its obligation. But by this compact he gives the society a legislative power over him ; that is, he gives it a right to prescribe such rules for his conduct, as the common understanding of the society shall judge to be necessary or conducive to the general good. And consequently by the same compact he obliges himself to observe these rules, when they are so prescribed ; whether at the time of prescribing them he immediately and directly consents to them, or disapproves them and even protests against them. In the mean time the obligation of these rules, which are nothing else but the civil laws of the society, is ultimately derived from his own consent. Though he does not immediately and directly consent to the laws at the time of making them, yet he remotely and indirectly consented to them by becoming a party to the social compact. If he had not consented to make himself a party to that compact, the society would have had no legislative power over him ; and consequently he would not have been obliged to observe any laws that it might prescribe.

In some other instances the difference between that consent, which makes a law binding upon us, and that consent, which makes us parties to a compact, lies near

to view, and may perhaps be seen more clearly, than in the complicated business of civil society. A number of individuals, suppose twenty, that have no particular connections with one another, have a design of engaging in some undertaking, which is to be carried on by their joint labour and at their joint expence. When they meet to deliberate upon the proper measures, which are to be pursued, each of them is at liberty to judge and to determine for himself concerning those measures ; and though fifteen out of the twenty should agree in their judgment ; yet no act of theirs would bind the other five. Nothing can bind all and each of them, but the immediate and direct consent of all and each. And such an act of consent is a compact. But suppose, that these twenty individuals, before any particular measures were proposed, had formed themselves into a society for carrying on the undertaking, which they have in view, and had entered into a general agreement to act jointly in carrying it on, according to the common sense of the whole number ; this agreement would likewise have been a compact ; it would have obliged each of the individuals no otherwise, than as each of them had made himself a party to it, by his own immediate or direct consent. But the effect of such a compact will be, that when any measure is approved and prescribed by fifteen out of the twenty, the other five, though they dislike it, and dissent from it, will be obliged to pursue it. Such measures or such rules of acting, as are agreed upon by the majority, which speaks the common sense of the whole, are laws to the rest ; they bind the rest, not as a compact does upon account of their immediate and direct consent, but upon account of their remote and indirect consent implied in a previous compact, by which they obliged themselves, in whatever relates to the common purpose, to observe such rules and to pursue such measures,

as the common understanding should approve and prescribe.

The case of a civil society, in a perfect democracy, is exactly the same with this : each individual, by becoming a member of the society, consents to carry on the purposes of a civil society, jointly with the rest, that is, in such a manner and by such means, as shall be approved and prescribed by the joint understanding or common sense of the society. This immediate or direct act of his own consent is what gives the society a general legislative power over him, or a general right to lay down rules for his conduct, in order to secure and advance the common good. Whatever particular rules therefore are approved and prescribed by the majority, which speaks the common sense of the whole society, he is obliged to follow these rules, whether he happens to be in the majority or not. On the one hand therefore they are not compacts ; because, by the supposition of his voting with the minority, he does not make himself a party to them by any immediate or direct act of his own consent. But then on the other hand they do not oblige him without his own consent ; because he remotely or indirectly consented to them, by consenting originally to pursue the proper purposes of a civil society, jointly with the other members, under the conduct of the common understanding.

In such a perfect democracy, as we have here supposed, all the members of the society are equal to one another. It may therefore be asked, in what sense the civil law of this society can be called the acts of a superiour ? But though in a perfect democracy no one individual is superiour to any other individual, and much less to all the rest ; yet the whole body considered jointly is superiour to any one of its members considered separately. The body of the society, when



any individual has united himself to it, has a right to direct his actions for the general good by the common understanding, and to compel him by the common force to observe its directions, if he is unwilling or refuses to observe them otherwise. Such a right, as this, is all, that we mean, when we say, that civil laws are the acts of a superiour. And this superiority is as intelligible, when it belongs to a great number of individuals acting jointly, that is, to the collective body of a society, as when it belongs to a legislative body consisting only of a few, or perhaps only of one.

II. The mere act <sup>e</sup> of civil union vests the civil legislative power only in the collective body of the society: no other laws will be binding upon each of the members in consequence of this single act, besides those, which are established by the whole or by the greater part of the whole. Wherever therefore any particular part of a civil society has an exclusive legislative power; this power must have been vested in such legislative body by some farther act of the society. And since no civil laws are binding upon the several individuals, who are members of a civil society, but in consequence of their own consent; the act by which any legislative body, different from the collective body, is established, must be an act of joint consent. Sometimes we consider this act of joint consent as a law, and call it the law of the civil constitution. Sometimes we consider it as a compact, and say, that a king in monarchies, or the nobles in aristocracies, or the representatives of the people in democracies, which are administered by representatives, derive their power from compact. There is some reason for calling it by these different names; because, in respect of what passes between the collective body and the several members, it is a law; and in respect of what passes between the

Civil constitutions established partly by law and partly by compact.

<sup>e</sup> See B. II. C. IV. §

<sup>f</sup> Ibid. §

same collective body and the particular persons, who are called to the office of civil legislation and established into a legislative body, it is a compact.

When a civil society, in view to the general good, has agreed to introduce and establish any particular form of civil government; the several members are obliged to submit to this form; though some of them might perhaps be of opinion, that it is not a proper or a beneficial form, and might publicly declare, that they do not agree to it. There is no more reason in the nature of the thing, why this act of the society should not be binding upon all its members without the immediate and direct consent of each, than there is, why any other act of the society should not be binding upon all without a like consent of each. The original compact of civil union gives the collective body a power to oblige each of its members to conform to whatever the common understanding approves and prescribes for the general good. If therefore it should appear to the common understanding, that a legislative body of this or of that particular form will be conducive to the general good, and the majority of the society should agree to establish such a legislative body; each of the members, even those, who are in the minority, will be obliged to comply with such establishment. Thus far the constitution of civil government is established by a law. The legislative body, which is to be introduced, does not indeed make this law; for no act of this body, till it is established, can be binding either upon the society in general or upon the several members of it in particular. The law therefore which introduces and establishes the form of the legislative body must be the joint act of the collective body. And this act, when we consider it in respect of the several members, may rather be called

a law than a compact; because it obliges even those, who immediately and directly dissent from it, at the time of making it; and this obligation arises from that remote and indirect consent, which they gave to the future acts of the society by making themselves parties to the social compact. But this act of the collective body, though it binds the several members of the society as a law, can be binding upon the collective body itself only as a compact: nothing, but the immediate or direct consent of the collective body of a civil society, can take from such body the legislative power, which it has by means of civil union, and lodge this power exclusively in some particular part.

III. When the right, which a civil society, or the legislative body of such society, has to prescribe laws to the several members of it, is called a natural right or a right of the law of nature; it is necessary to observe in what sense we call it so.

Internal  
and external  
obligation of  
civil law.

No right of this sort belongs either to any one man, or to any number of men by the gift of nature. All mankind are placed by nature in a state of equality and consequently whatever right any one man may have to prescribe laws to a number, or whatever right any number of men may have to prescribe laws to one, this right must be of the adventitious sort and cannot in the strictest sense of the words be a natural right.

But we frequently enlarge the sense of the word, and mean by the natural rights of mankind, not only such rights, as belonged to them by the gift of nature, but such adventitious rights likewise, as either did subsist, or might have subsisted, in a state of nature. However, the right, which a civil society has to prescribe laws to its members, cannot be a natural right in this enlarged sense of the words; because the notion of this legislative right limits it to a state of civil society.



There is still a third sense, in which the rights of mankind may be called natural rights, or rights of the law of nature: whatever rights are acquired by such means as are natural, or agreeable to the law of nature, are under the protection of this law, and may therefore be called natural rights, or rights of the law of nature; <sup>h</sup> because this law forbids the violation of them. The legislative power of a civil society, or of the legislative body of such a society, is a right of this sort. The society acquires it by the immediate and direct consent of the several individuals, who make themselves members of such society; and the legislative body acquires it, as by the immediate and direct consent of the collective body of the society, so by the remote and indirect consent of the several members. <sup>i</sup> If therefore we trace the obligation of civil laws back to its highest source, we shall find, that it is derived out of the law of nature. The immediate cause of the obligation of civil laws is the authority of the legislative body: this authority is vested in the legislative body by a compact, between such body and the collective body of the society: and this compact is binding upon the several members, in consequence of their having consented, and made themselves parties, to the first social compact, which gave the society a right to bind all and each of them to whatever the common understanding should approve and prescribe for the security and advancement of the general good. But since obligations arising from consent are obligations of the law of nature; it follows, that the members of any civil society are obliged by the law of nature to obey the civil laws of it; because the obligation of these civil laws arises from their own consent.

The obligation of civil laws, as it is thus derived from the law of nature, rests upon the consciences of mankind, and is called the internal obligation of such laws.

<sup>h</sup> See B. I. C. II. § VIII.

<sup>i</sup> Grot. Proleg. 15. 16.

Whatever is the foundation of moral obligation, in respect of any other parts of the law of nature, whether it is the will of God, who has made happiness the natural effect of our obedience and misery of our disobedience, or the suggestions of a moral sense, or the fitness and relations of things, or all these principles taken together; there is the same foundation of our obligation to obey the laws of our country.

Civil laws, like the law of nature, from which they are derived, might fail of producing their effect; that is, they might fail of securing and advancing the good of the society in general and of its several members in particular; if it was wholly left to mens own consciences, whether they would observe these laws or not. But wherever the law of nature gives a right to demand, that any thing should be done or be avoided, it likewise gives a right to support this demand by the use of force. Thus in a state of natural liberty, as the law of nature forbids doing an injury, so it gives individuals a right to defend themselves by force against an injury, which they are likely to suffer, and to obtain reparation or to inflict punishment upon account of an injury, which they have suffered. In like manner, where mankind are united into a civil society, as the law of nature forbids the violation of the civil laws of such society, so it gives the society a right to make use of force for the support of them. The only difference in this respect between a state of nature and a state of society is, that in a state of nature this force is in the hands of individuals, and may be used at their discretion; whereas in a state of society, it is in the hands of the public or of the executive body, and can only be used under the direction of the common understanding.

<sup>k</sup> See B. I. C. I. § VI.

If either through want of skill or through want of attention we see no reasons in point of conscience for obeying the laws of our country; or if through malice or through selfishness we allow no weight to those reasons, when we do see them; obedience may still be obtained by means of the common force. The apprehension, that this force will interpose in support of the laws, and will either prevent us from being gainers, or will perhaps make us losers, by breaking them, is such a reason for obeying them, as lies plain and open to the most unskilful and inattentive, and will be likely in point of prudence to get the better of our malice, and to give a turn to our selfishness in favour of obedience. The obligation to obey the laws, which arises from this apprehension, that the public force will interpose in support of them, is called their external obligation.

A civil law obliges internally, when it is made and promulgated.

IV. The civil legislator makes or enacts a law, when he requires the subjects to do or to avoid this or that, which the law expresses. But the mere making of a law does not produce any internal obligation, or bind the subjects in conscience to observe it. No man is naturally obliged to obey a law, any further than he knows, or might know. if he pleases, what the law is: the will of the legislator can be no rule to him, till he is acquainted with it, or has such an opportunity of being acquainted with it, that, if he is ignorant of it, his ignorance must be owing to his own neglect. Civil laws therefore, before they can produce any internal obligation, must be promulgated or made known, as well as enacted.

The sanctions of civil law produce its external obligation.

V. What the legislator does farther, besides enacting and promulgating a law, in order to obtain obedience to it, is called establishing it upon some sanction. The external obligation of the law arises from its sanctions which are nothing else but the directions, that the legislative gives to the executive concerning the purposes, for which the public force is to be used, or concerning the manner of using it, against those, who break the law.



From hence it appears, that the external, as well as the internal, obligation of civil laws arises from the legislator. For though the public force is in the hands of the executive body, and the laws more immediately produce their external effect by the use of this force, or by the apprehension of its being used ; yet the executive body in this instance acts only in conformity with the functions, which the legislative has established.

VI. The first intention of the civil legislator in establishing a law by any sanction is to procure obedience to such law, to prevent the harm, which the law forbids, or to obtain the good, which the law commands. But his intention does not stop here : if he fails of procuring obedience to the law in the first instance, his farther intention is to remedy the harm, that has been done by breaking it, and to hinder them, who have broken it once, from doing the like again. These intentions of the legislator may be obtained by two sorts of functions, by such as provide, that he, who breaks the law, shall be no gainer, or shall not obtain the purposes, which he had in view, by breaking it ; and by such likewise as provide, that he, who breaks the law shall be a loser by breaking it. If the law says, that all devises of lands or tenements by will shall be void, unless the will is subscribed by the testator in the presence of three witnesses, and is attested by those witnesses ; the sanction of such a law consists in making the will void : the testator cannot obtain the purpose which he had in view, by making such a will ; and the testamentary heir has no temptation to put the testator upon making such a will, and no motive to claim under such an one, if it is made, because the law will prevent him from being any gainer by it. When the law forbids doing a damage of any sort, and commands, that reparation shall be made, if such damages

Penal functions not essential to civil law.

is done ; the sanction of the law, which consists only in the command to make reparation, does nothing more than hinder any person from being a gainer by breaking the law : and such a sanction provides for obtaining the first intention of the legislator, that is, it secures obedience to the law, only by making it not worth any persons while to break it. Now if by a penal sanction we mean the appointment of a punishment ; such sanctions as these cannot be called penal sanctions : here is no appointment of a punishment ; the legislator does not aim at securing obedience by threatening to make them losers, who break the law, or to take any right from them, which they enjoyed before, but only by providing, that they shall be no gainers, or that they shall obtain no right by breaking it. As sanctions of this sort do not in the first instance aim at securing obedience to the law by threatening punishment, so neither do they operate afterwards by inflicting punishment in order to prevent those, who have broken the law once, from breaking it again. They do not look forward to what may be done hereafter, but only backward upon what has been done already : they do not endeavour to prevent or restrain him, who has done wrong once, from doing the same or the like wrong at another time ; they only endeavour, as far as may be, to undo the wrong, which is past. If indeed we call every interposition of the public force, to support a law, by the name of punishment ; then even those laws, which only aim at undoing the wrong, that is past, may be said to be established by penal sanctions : because when any person, who has broken the law, will hold out against it, and will keep possession of what he has unjustly gained by breaking it ; the law, which forbids making such unjust gain, gives those, who have suffered by the wrong, which he has done, a right to the

assistance of the public force, in order to compel him to do them that justice, which he refuses to do otherwise. But certainly, where the sanction of a law produces only such interpositions of the public force as this, it can with no more propriety be called a penal sanction, than what an individual in a state of nature does by his own private force for obtaining reparation of damages can be called a punishment. When the law makes a will void, it will take care, that what is devised in such will shall go to the heir in intestate succession. If the testamentary heir takes possession of the lands and tenements devised by the void will, and keeps possession, till the other obtains a judicial sentence; though what he has done is contrary to the law, yet if he submits to the sentence, after it is given, the law is satisfied. When the sanction looks no farther than the wrong, that he did, without regarding the bad disposition, that led him to do such wrong; it only requires him to undo his own act, and inflicts no evil upon him for having done it. Or suppose, that he holds out after sentence, and that the public force interposes to compel him to quit possession; yet if it interposes for no other purpose, this is no punishment. The design of such interposition is only to make the act void in fact, which the law had made void of right; that is, to undo what has been done already, and not to make him suffer any harm in order to prevent him from doing the like again.

What has here been shewn to be the case in one instance is in general the case of all laws, which consider only the damage, that a man has done by an injury, without considering the disposition of mind, that led him to do it. These laws inflict no punishment, if he is willing to make reparation: and even if he is unwilling though the public force interposes in support



of the law ; yet the design of this interposition is only to compel him to do what is just, and not to punish him for having done what is unjust.

Penal sanctions are properly acts of the civil law, by which it appoints, that he, who behaves otherwise, than such law directs, shall be a loser, shall be deprived of some right, which otherwise belonged to him, or shall suffer some evil, from which he had otherwise a right to be free. But since the rules, which the civil legislator prescribes for the general good, not only oblige the consciences of the subjects, but may and do in many instances produce their external effect without such appointments ; the consequence is, that penal sanctions are not essential to civil laws.

If we enlarge the notion of penal sanctions, and include in it any interposition of the public force whether this force interposes to compel men to do what is right, or to make them suffer some evil for having done what is wrong ; in this sense of the words, which seems however to be an improper one, civil laws must be allowed to depend upon penal sanctions for their external obligation. But still these sanctions are not so far essential to civil laws, as to make it impossible for any civil law to oblige without them : because the bare enacting and promulgating a law produces an internal obligation ; though nothing, which can be called a penal sanction, should be added to the law. Unless indeed it should be said after all, that the law of nature itself is supported by penal sanctions, and consequently that all civil laws since their internal obligation is derived from the law of nature, must be ultimately supported by the same sanctions with the law of nature.

Proper  
matter of  
civil laws,

VII. As the purposes, for which men unite themselves into civil societies, determine the nature and terms of the social compact ; so the nature and terms

of this compact, which is the foundation of civil legislative power, determine what are the proper objects of this power. Each individual is led by a view to his own security and benefit to associate with the rest; and they, by receiving him amongst them, as a member of the body politic, agree to aid him in pursuing this end. But since each and all of them have the same end in view; they cannot be supposed to receive him upon any other terms, but those of his consenting to join with them in maintaining their security and benefit. And consequently he, by the act of joining himself to them, must be understood to agree to these terms. Thus the particular interest of each member is taken under the protection of the whole: so that the whole obliges itself to act for his security and benefit: but at the same time a common interest of the whole is formed; and each member obliges himself to act jointly with the rest with this common interest. The claim of each member upon the society is limited by the obligation, that he lays himself under towards the society, and by the obligation, that the society is under towards each of the other members. He can have no claim upon the society to act for his security and benefit, where it interferes with the common security and benefit of the whole; because he is obliged to act with the society for this common security and benefit: and whilst he lays himself under this obligation, he cannot be understood to acquire any claim, which is inconsistent with it. He can likewise have no claim upon the society to act for his security and benefit, where it is inconsistent with the security and benefit of any of the other members: because the society is under the same obligation in respect of the others, that it is under in respect of him: and consequently it could not engage to advance his interest at the expence of theirs.

Upon the whole therefore, a number of individuals, by joining in a social compact, oblige themselves to act together, for the purposes of obtaining the common good of all, and the particular good of each ; as far as the particular good of any one is consistent with the common good of all, and with the particular good of others. But where a number of persons bind themselves to act jointly for any purposes, the common understanding of such society is their guide, in respect of what they are to do, and what they are to avoid, in order to obtain those purposes. A civil society therefore has a right, by its common understanding, thus to guide itself and its several members. And since the legislative power of such society consists in this right, it follows, that whatever is necessary or conducive to the common good of the society, or to the particular good of the several members, as far as the particular good of any one is consistent with the common good of all, and with the particular good of others, is the proper object of legislative power. Now civil laws are nothing else but such rules, as the legislative power of a civil society establishes for the direction of all and of each of its members. Whatever therefore is the proper object of civil legislative power, is likewise the proper matter of civil laws.

Matter of  
natural  
right and  
wrong  
may be  
matter of  
civil law.

VIII. From hence it appears, that the matter of civil laws is not confined to such things, as the law of nature has left indifferent by neither commanding nor forbidding them. The law of nature commands whatever is necessary or conducive to the security and benefit of mankind in general, and forbids the contrary. As far therefore as what is necessary or conducive to the security and benefit of mankind in general, is necessary or conducive likewise to the security and benefit of that particular part of mankind, which is united into the same civil society ; and as far as what is inconsistent with the security and benefit of mankind in general, is inconsistent



likewise with the security and benefit of that particular part of mankind, which is thus united ; the civil legislator is employed about the proper objects of his legislative power, when he commands the former or forbids the latter. His laws therefore contain what is a proper matter of civil law, when they command such actions, as the law of nature has commanded, or forbid such actions, as the law of nature has forbidden.

Mankind are indeed obliged to do what the law of nature commands, and to avoid what this law forbids, without the aid of civil institutions. But we cannot conclude from hence, that it is needless, and much less, that it is improper, for civil laws to command what is naturally a duty, or to forbid what is naturally a crime. For though the members of a civil society are obliged to observe the law of nature ; whether its rules and precepts are transcribed into the civil law and adopted by it or not ; yet, till they are thus transcribed and adopted, the obligation to observe them rests only upon the conscience.

It may perhaps be asked, whether the law of nature has not an external, as well as an internal sanction in a state of nature ; whether mankind have not a natural right, where any injury has been done by breaking this law, to make use of their private force to obtain reparation and to inflict punishment ? And if such an external sanction takes place in a state of nature, it may be farther asked, whether the law of nature is not naturally supported in a state of civil society by the like sanction, without being made a part of the civil law of the society ?

In answer to these questions, we may observe, that this external sanction of private force reaches in a state of nature no further than <sup>1</sup> the duties of justice, and

<sup>1</sup> See B. I. C. XVII. § III. C. XVIII. § IX.

that the duties of imperfect obligation are supported only by the internal sanction of the law of nature. The law of nature obliges mankind to promote the good of one another : but this obligation, in a state of nature, is of the internal sort : no man has a right to compel others by force to do any thing, which is matter of favour ; however reasonable it may be in him to expect the favour from them, and however wrong it may be in them not to do it. Nothing therefore in a state of civil society, besides the social compact, or some civil law, which is founded in this compact, can bind the several members of such a society to do good either to one another, or even to their country, so as to make the doing good a matter of strict justice, which may be supported by the external sanction of force. But the obligation of the social compact is only a general one to advance the common good of all or the particular good of each : it is left to the joint or common understanding, that is, to the civil legislator, to determine in what instances and by what means this good is to be done. And consequently if civil laws are not necessary to enforce the law of nature in respect of any other duties ; they are at least necessary to enforce it in respect of the duties of imperfect obligation.

This however is not the only reason, why it is necessary for civil laws to establish the duties of the law of nature. Not only those natural duties, which in a state of nature have no external sanction, but those likewise, which in a state of nature are supported by the external sanction of private force, would in a state of civil society have no external sanction, without the aid of civil laws. For <sup>m</sup> social union restrains those, who are members of the same civil society, from making use of any private force against one another : so that no external sanction can be left in respect of any duty whatsoever,

<sup>m</sup> See B. II. C. V. § II. VII. IX.

besides what comes from the public force. But the public force is under the guidance of the common understanding; it cannot act of right either in matters of defence, or in matters of reparation, or in matters of punishment, any otherwise than as the common understanding directs it. No injury therefore can be guarded against, no reparation can be obtained, and no punishment can be inflicted, unless the injury, which is to be guarded against, or to be made amends for, or to be punished, is contrary to the civil laws: because the civil laws contain those directions of the public understanding, which the executive body is to follow in using the public force.

If punishment in a state of civil society can only be inflicted of right by the public force; and if the public can only of right inflict punishment, as the laws direct it; the conclusion from hence will be, that no action can of right be punished in a state of civil society, unless the civil laws have forbidden it. This will explain what we frequently hear, that such or such acts are very malicious and very unjust, that they deserve punishment as much or more than some others, which the law does punish; and yet that these may be done with impunity. These acts, which are said to be so malicious or unjust, as to deserve punishment, are such as would be punishable by private force, if every member of a civil society had the same liberty of acting for himself, that individuals had in a state of nature; or they would be punishable by the public force of the society, if the public force had no rule to guide it, besides the law of nature. But civil union has taken from the individuals the liberty of punishing by their own private force; and the public force of a civil society is under the direction of the civil law. If therefore the acts, how malicious or unjust soever they may



appear to be, are such as have not been forbidden and made punishable by some civil law, either written or unwritten; they cannot of right be punished, by the members of a civil society either acting separately as individuals, or acting jointly by the executive body.

It may however be proper to observe by the way, that this civil impunity does not make such acts innocent: the law of nature has made them crimes, notwithstanding the civil law may have omitted to make them so, or to forbid them under any penal sanction. They they therefore, who are guilty of such acts, though they may escape human punishment, must stand condemned by the law of nature, and be liable to the natural sanctions, by which the divine author of this law has thought fit to establish it.

Civil laws  
not confin-  
ed to mat-  
ters of na-  
tural right  
and  
wrong.

IX. Though civil laws may command such things, as the law of nature has commanded, or forbid such things, as this law has forbidden; yet civil legislators are not confined from commanding or forbidding any thing else. What is naturally right or wrong is a proper matter of civil laws; but it is not the only proper matter of them. The social compact gives the society a right to command what is for the common good of the body or for the particular good of its several members, and of forbidding the contrary. But the law of nature has left many acts indifferent, as doing neither good nor harm to mankind in general, which yet may be beneficial or hurtful to a particular body of men united into a civil society. It is matter of indifference, as to the good or harm of mankind in general, what sort of cloaths I buy and wear, whether they are such, as have been manufactured by those, who live near me, and speak the same language, that I do, or by others, who live at a distance and speak a different language. It may indeed be most for the

benefit of my neighbours, that I should trade with them and wear only such cloaths, as they deal in: but it will be of equal benefit to those, who live in the Indies, that I should wear such cloaths, as they only can furnish me with. The law of nature therefore, obliging me only to regard the benefit of mankind in general, leaves it indifferent to me, whether I buy and wear such cloaths, as are manufactured in the Indies, or such, as are manufactured in the place where I happen to live. But when they, who live near me, are united with me into the same civil society; if it appears to the public understanding to be for the benefit of such society, that no member of it should buy or wear such clothes, as are manufactured in the Indies: the social compact has given the society a right to forbid this, or to make it criminal by a civil law, and then to punish me or any other member of the society for doing it. The law of nature, as it stood in a state of nature, has prescribed no particular form for the marriage contract, and has not enjoined, that the parties should make it in any particular place. The form therefore of this contract is indifferent, provided it contains in substance all, that is naturally essential to marriage; and the place, where the parties are, when they make it, is likewise indifferent. But if it appears to the common understanding of a civil society to be for the general good, that all marriages should be solemnized under some particular form, and in some particular places; the civil legislator has a right to prescribe by law, that all marriages shall be solemnized under such form, and in such places, and to punish those who shall solemnize any marriage otherwise.

Perhaps it may appear at first sight, that whatever civil laws enjoin or forbid with a view to obtaining good, or preventing harm, to the body politic or to its

several members, is only matter of natural right or wrong. What in a state of nature was not matter of natural right or wrong, may seem to have been made so in a state of civil society by means of civil union. For the compact, by which men are united into a civil society, may be thought naturally to oblige them to do whatever is necessary or conducive to the general good of such society, and of its several members and to avoid the contrary; whether the former is commanded, and the latter forbidden by any express civil laws or not. But this is not precisely true. The social compact obliges them in point of justice to do, not whatever is for the common interest in their own private opinion, but only what they are directed to do for this purpose by the common understanding: in like manner it obliges them in point of justice to avoid, not whatever may be hurtful to the common interest in their own private opinion, but only what they are directed to avoid with this view by the common understanding. Till the civil laws therefore which are the dictates of the common understanding, have enjoined or forbidden what in a state of nature was indifferent; it continues to be so far indifferent as to the members of a civil society, that it is no duty of strict justice to do or to avoid it. I would not be understood to mean, that a man is under no obligation of any sort to do what he thinks will be for the good of his country, or to avoid what he thinks will be hurtful to it; till the civil laws have enjoined the one or forbidden the other. I only say, that till then, it is not a duty of strict justice; or that the social compact does not give the society a perfect right to demand this of him: because this compact does not oblige him to guide himself in obtaining the purposes of a civil society by his own judgement, but by the



common judgement of the whole. This will appear to be the case, if we consider the difference between a strictly just member of a civil society, and a good patriot. The former is exactly punctual in complying with the laws of his country; whilst the latter, as far as he is able to judge, avoids every thing, which may be hurtful to the public, and does every thing, which may be beneficial to it, even in those instances where the laws are silent. The social compact itself is so far from binding a man in strict justice to hold this conduct, that the laws, which are founded in this compact, will frequently oblige him to do what in his own opinion may be hurtful to the society, and to avoid what in his own opinion might be beneficial to it. But if, whatever his own opinion may be, the civil laws are his proper guide, as to what is due to the society, of which he is a member, in consequence of the social compact; it follows, that what was indifferent in a state of nature, will be so far indifferent in a state of civil society, whilst it is neither enjoined nor forbidden by the civil laws, that the members of such society will be at liberty to do it or to omit it without being chargeable with acting contrary to their social compact.

X. The rights of mankind, as far as they consist in a full liberty of doing certain actions, or of possessing certain things, may be altered or restrained or given up by their own consent. Every compact produces this effect; it limits or restrains or takes away some right, that is, some instance of liberty, which the parties to it were possessed of, before they engaged in such compact. And we have <sup>n</sup> already had occasion to shew, that the social compact in particular produces this effect upon such rights of mankind, as arise out of an injury: it restrains their liberty of defending

Rights of  
mankind  
may be  
changed  
by civil  
laws.

<sup>n</sup> See B. II. C. V.

themselves, of obtaining reparation for damages, and of inflicting punishment, by the use of their own private force under the conduct of their own judgment. But this is not the only effect of this compact. As it alters or restrains some of the rights of mankind immediately or directly, so it subjects others of them to be altered or restrained by the legislative power of civil society: and thus whatever alterations or restraints are produced in them afterwards by civil laws, which are acts of such legislative power, arise from this compact remotely or indirectly.

They, who maintain, that the liberty of individuals is universally unalienable, would do well to shew, how the obligation of civil laws is consistent with this principle; how individuals, who in a state of nature were at full liberty in any particular instance to act as they pleased, can be obliged, by the laws of their country, when they are members of a civil society, to act in this instance in one particular manner, or not to act in at all, and yet have the same full liberty of acting, as they please, that they had before, and would still have had, if they had not by compact united themselves to such society. For certainly, if they have given the society a power to restrain their liberty of judging and of acting for themselves; their liberty must be alienated; as far as the society has a power to restrain them, they must have given up a part of their liberty.

This power of civil society to alter or restrain the rights of mankind, is limited by its own nature. It extends no farther than the purposes of the social compact, by which it was produced: as the parties to this compact only bind themselves to act for the common good of the whole society and of its several parts; so the power, which is produced by this compact, can, in its own nature, extend only to such restraints or altera-

tions of any of the rights of mankind, as in the judgment of the common understanding are necessary or conducive to those purposes. Civil legislative power therefore is not in the strict sense of the word an absolute power of restraining or altering the rights of the subjects: it is limited in its own nature to its proper objects, to those rights only, in which the common good of the society, or of its several parts, require some restraint or alteration. So that whenever we call the civil legislative power either of society in general, or of a particular legislative body within any society, an absolute legislative power; we can only mean, that it has no external check upon it in fact: for all civil legislative power is in its own nature under an internal check of right: it is a power of restraining or altering the rights of the subjects for the purposes of advancing or securing the general good, and not of restraining or altering them for any purpose whatsoever, and much less for no purpose at all. This internal check may possibly fail of guarding the rights of individuals against undue restraints or alterations: because by the consent of such individuals, when they become members of a civil society, they left it to the common understanding of such society to determine what restraints or alterations of their rights might be necessary or conducive to the general good; and the society may possibly abuse this trust. The danger is still greater, if the society has gone farther, and has established a particular legislative body: for this point is then left to be determined by the understanding of such legislative body. To prevent such abuse it is necessary to provide some external checks upon the exercise of civil legislative power; more especially where it is not exercised by the whole collective body of the society, but by some particular part of it, which is called its legislative body. For



though it is possible, that the whole collective body, if it could conveniently meet together, might in the laws, which it makes, exceed the limits of legislative power, and restrain or alter the rights of individuals, where the good of the whole or of its several parts required no such restraint or alteration: yet it is not very likely, that this would happen: because, as each of the members will be ready to take care of his own particular interest, it is not likely, that any of the rights of individuals should be altered or restrained by the act of all or of a majority, unless the restraint or alteration was necessary or conducive to the proper ends of a civil society. But where the legislative power is entrusted, with a part of the society; if this legislative body has no checks upon it, besides the internal check of natural right; it might be led by motives of private interest, or by caprice, or by partial regard, to alter or restrain the rights of some or of all the subjects, without any view to the general benefit. It is the business of the politician, in order to guard against any such excess in the exercise of legislative power, to contrive some external checks upon the legislative body. I call them external checks to distinguish them from the internal check arising from a sense of what is right; though perhaps some, which are made use of for this purpose, as they arise from the nature of the legislative body, might themselves be called internal ones. When the legislative body consists of two, three, or more constituent parts, so that no law can be made without the joint act of all these parts; they may be a check upon one another. And this will be more likely to be the case; if they are so different from one another, that what might be for the private interest of one of them, would not be for the private interest of another of them; though what is for the common benefit of the whole society will in some respect or other be for the particular benefit of them all.

This check will be the more effectual; if one or more of these constituent parts of the legislative body consists of a number of persons, each of which in his private capacity is subject in all respects to the same laws with the rest of the people. For each member of such constituent part of the legislative body will be the more careful about unduly altering or restraining the rights of the other members of the society; since in whatever manner, or in whatever degree, the rights of others are altered or restrained, his own rights will likewise be altered or restrained in the same manner and in the same degree. If one of these constituent parts of the legislative body consists of temporary representatives of the people, that is, of persons, who are chosen by the bulk of the society, and return again after a certain time to their private station and to a level with the rest of the subjects, unless the society will chuse them into the same office and trust again; this will be a farther check upon the legislative body, and will help to restrain it from any undue excess in the exercise of legislative power: because the bulk of the society will have frequent opportunities of providing for its own interest, by displacing those, who have been concerned in any such excess, and returning such a body of representatives, as may take care, that the rights of individuals shall be no otherwise altered or restrained, than the ends of civil society require. Such checks as these, which the constitution of the civil government in any nation has provided, for preventing any undue exercise of legislative power, are called constitutional checks. Perhaps many others besides these might possibly be contrived; but it is not our business here to enquire, either what others might be contrived, or how any checks of this sort operate to produce the end, which is proposed by them. This is the province of politics and not of natural law.

As the nature and ends of civil legislative power limit it in some instances, so the nature of the rights of mankind limit it in others. Some of the rights of mankind imply a duty, which is required of them by the law of nature or the law of God. Every man has an unalienable right to do what these laws command, and to avoid what these laws forbid.

° But even such rights, as imply a duty, consist in a liberty, though not in a full liberty of acting. We are naturally at liberty to do what the law of nature or of God commands; not because we are at liberty to do the contrary; but because we are naturally free from all external force, that might compel us to do the contrary. Thus likewise we are naturally at liberty to avoid what the law of nature or of God forbids, not because we are at liberty to do otherwise, but because nature has not subjected us to any external force, that might compel us to do otherwise. The law of nature or of God has left some things indifferent, by neither commanding nor forbidding them: in such instances as these, our right of acting consists in a full liberty of doing them or of not doing them, just as we please. The same laws have made some things duties and others crimes; in these instances we have not a full liberty, but are obliged to do the one, and not to do the other: so that here our rights consist in a liberty on one side only, that is, in a liberty of obeying those laws, or in a freedom from all external force, that might compel us to disobey them.

Now though our rights are alienable, or may be parted with by our own consent, where they are absolute, or consist in a full liberty of acting, as we please yet they are unalienable, where they consist in a liberty, which is not full and absolute, in a liberty of acting only one way, or in a freedom from being liable to



be compelled to act otherwise. The general rule concerning alienable and unalienable rights is, that those are alienable, which are not restrained or limited by any law; but that those, which are so restrained and limited, are unalienable. Where the laws of nature and of God have left an action indifferent, by neither commanding nor forbidding it; our right to do or not to do that action is full and absolute; it is not restrained or limited either by the law of nature or by the law of God; and consequently we may, consistently with these laws alienate this right; that is, we may by our own consent give others a power to direct us to act either this way or that for some reasonable purpose. But where the law of nature or the law of God has commanded an action and made it a duty, or has forbidden an action and made it a crime, in respect of such actions, our right or liberty of acting, as we please, is not full and absolute; it is restrained and limited by the same law, which has commanded or forbidden the action; so that it consist only in a freedom from being compelled to disobey the law. We cannot therefore consistently with the law alienate such rights; that is, we cannot part with our liberty, any farther than we have it: we may by our own consent give others a power to enforce the obligations of the law of nature or of God; but these laws, as they oblige us to act in one particular manner, have not left us at liberty to oblige ourselves by our own consent to act otherwise, or to give others by such consent a power of compelling us to act otherwise. But if mankind cannot by consent or by compact give others a power of binding them to do what the law of nature or of God has commanded, or to neglect what either of these laws has forbidden; the legislative power of civil society, which is derived from consent or compact, cannot imply a power of binding the members of such society to act contrary to these laws.

If I had not thought it necessary to apply here what has been already said, concerning the nature of the rights of mankind, and concerning the distinction of them into such as are alienable, and such as are unalienable; we might have come to this conclusion more readily. No man can oblige himself by his own consent to act one way, when he is already obliged to act the contrary way. But every man is originally obliged to do what the laws of nature or of God command, and to avoid what these laws forbid: so that notwithstanding individuals may bind themselves by their own consent to do or to avoid what God by his natural or his revealed law has neither commanded nor forbidden; they cannot so bind themselves to do what he has forbidden, or to neglect what he has commanded. And since the social compact itself, and civil laws, which derive their authority from this compact, are obligations arising from consent, either immediately and directly, or remotely and indirectly; the consequence is, that no man can be obliged, either by civil union or by civil laws, to act contrary to the natural or to the revealed law of God.

In applying this general principle to particular instances, we are apt, for want of attention, to make two mistakes. The first of these mistakes is, that since civil laws cannot oblige us to do what is contrary to the law of nature, or cannot so change the law of nature, as to make any action lawful, which this law has forbidden, we are apt to conclude, that whatever action is contrary to the law of nature, whilst the civil law is silent about it, must necessarily continue to be contrary to the law of nature, notwithstanding any appointment of the civil law in relation to it. But upon a closer enquiry into this matter, we shall find, that the appointment of civil law, nay that even the act of an individual, can make it na-

turally lawful to do or to omit what without such appointment of the civil law or such act of the individual could not have been lawfully done or omitted.

The law of nature, in a state of equality, forbids me to force a man to work or labour for my benefit, who has not bound himself to me by his own consent for this purpose. But after he has so bound himself, such force is no longer contrary to the law of nature: not because the law of nature is changed by his consent; but because his circumstances and mine are changed by it. The law of nature still continues to forbid me to force any man to work or labour for my benefit, who has not bound himself to me, by his own consent, thus to work or labour: but after he has so bound himself, this particular precept of the law of nature is no longer the measure of what is just and unjust between him and me. As long as his right to his liberty continues, my natural obligation not to force him to do what he has no mind to do continues too: but when he has parted with this right by voluntarily making himself my servant; the natural obligation on my part ceases, and in consequence of his consenting to be my servant, I have acquired a right to force him to work for me, whether he is afterwards willing to work or not. It is contrary to the law of nature to take a man's goods from him; but after he has sold them to me, if he refuses to deliver them upon my paying him the purchase money. The law of nature does not forbid me to take them from him; not because the law of nature is changed; for what was forbidden by it before, is forbidden by it still; but because those goods, which were his own once, have ceased to be his own now: and thus the precept of the law of nature, which was, in respect of these goods, the measure of right and wrong between him and me, ceases to be



the measure in consequence of his have given up his property in the goods by his own consent. When I owe money to a man, the law of nature commands me to pay it: but my creditor without changing the law of nature can set aside the obligation of this command as to himself, by releasing the debt without payment: for though the law of nature still commands me to pay what I owe; it ceases to command me to pay any thing to him, because by his release I cease to owe him any thing. In general we may say, that no obligation of the law of nature can be set aside by the act of the party himself, who is under such obligation: but where the obligation corresponds to some alienable right of others, they by relinquishing their right can release him from the obligation. Neither do they by their act change the law of nature, when they set his obligation aside: they only change his circumstances and their own; and then the particular precept of the law of nature, which before was the measure of right and wrong between him and them, ceases to be so upon this change of circumstances.

From hence it will appear in what manner the civil law produces its effect; when such acts as were contrary to the law of nature before any appointment of civil law concerning them, become consistent with it in consequence of such appointment. No person by his own consent, either in the social compact or otherwise, could give the society, or the legislative body of the society, a power to dispense with his doing what the law of nature has obliged him to do, or to authorize his doing what the law of nature has obliged him not to do. But where his obligations correspond to such alienable rights of others, as are subjected by the social compact to the jurisdiction of the civil legislative power; the society has a power to restrain or to take

away their rights, and by this means his obligation ceases. It is contrary to the law of nature to take a person's goods from him: but if the civil law has required the subjects to pay some tax for the support of the society; the officers, who are employed to collect this tax, if the civil law has authorized them, may, consistently with the law of nature, take from any subject, who refuses to pay his share, such goods as will sell for as much money as he ought to pay: not because the civil law can authorize them to take another man's property from him; but because the goods, which otherwise would have been his property, cease to be so by the appointment of the law. He has a right to his goods indeed, and whilst this right subsists, it would be contrary to the law of nature to take them from him. But the law of nature does not forbid him to part with this right: and as far as it is necessary for him to contribute, with the other members of the society, to the support of the public, he has parted with this right, or however has subjected it to the jurisdiction of the public, by making himself a party in the social compact.

Since the civil law, when it thus releases a person from any of the duties of the law of nature, which he owes to other men, operates by an indirect act, that takes away such of their rights, as correspond to these duties; we may observe by the way, that it cannot release him in the same manner from any of the duties, which he owes by the law of nature either to himself or to God: because in these duties there are no corresponding rights, which are subject to the jurisdiction of civil society.

When we find it laid down as a general principle, that civil authority cannot establish any thing, which

is contrary to the laws of nature or of God ; we are apt to fall into a second mistake, in applying this principle. We are apt to imagine, where the laws of nature or of God relate to persons, who are in particular circumstances, that it is not only impossible for any civil jurisdiction to dispense with their obligation, when they are in these circumstances, but that it is likewise impossible for any civil jurisdiction to make their obligation void by preventing them from bringing themselves into these circumstances : we are apt to imagine, that, where a duty of the law of nature or of God takes place upon the performance of some certain act, this act itself is not under the jurisdiction of civil society, and cannot be made void by the civil legislator.

The most remarkable instances of this sort are the obligations arising from promises, contracts, or oaths, and the obligations arising from marriage. These are points of some difficulty, and with the readers leave we will examine them particularly.

Effect of  
civil laws  
on pro-  
mises con-  
tracts and  
oaths.

XI. <sup>r</sup> No act of the civil law can excuse a man from performing a promise, or a contract, or an oath, by which he is bound : because where the obligation arising from any of these acts subsists, the law of God, either as it is collected from natural reason, or as it is declared in his revealed word, requires performance. But the true state of the question, concerning the effect of civil laws in relation to these acts, is, not whether the civil power can excuse performance, where there is an obligation upon a man arising from any of them ; but whether the civil power cannot hinder the obligation from taking place. Though a man, when he is in such circumstances as to be bound by his promise, contract, or oath, cannot be excused from performance by the

<sup>r</sup> Grot. L. II. C. XIII. § XX.



civil law ; yet it is no consequence, that the civil law cannot hinder him from being in those circumstances.

Now the civil law can hinder or make void the obligation of a promise, contract, or oath two ways ; either by such an act, as affects the promiser, contracter, or juror immediately ; or by such an act, as immediately affects those, to whom the promise, contract, or oath, relates, and in the mean time affects him only remotely. And farther where the act of the civil law affects him immediately, it may be either antecedent or subsequent to the promise, contract, or oath.

When the civil laws have antecedently forbidden the members of any society to promise, or agree, or swear, that they will do this or that, which the law expresses ; no promise, or contract, or oath, which is contrary to such laws, can be binding upon them. Notwithstanding, where they are under an obligation by any of these acts, the law of nature and of God requires performance ; yet this law requires no performance of what is contained in such promises, or contracts, or oaths, as the civil laws have forbidden ; because the members of the society are in these instances incapable of obliging themselves. They, who are under the authority of another, have no liberty or moral power of binding themselves to do what this other forbids, or to neglect what he commands. As far therefore as the jurisdiction or authority of the civil legislator extends ; the subjects are incapable of obliging themselves in opposition to his laws. They have indeed the natural power of repeating the words of such promises, or contracts, or oaths, as his laws have forbidden. And custom may lead us, or the want of another name may force us, to call the mere repeating of these words a promise or a contract or an oath. But they, from whom the civil laws have taken the liberty or moral power of acting

for themselves, do nothing by repeating them: the words alone without such liberty or moral power produce no obligation.

This principle, upon which the civil laws make void such promises, or contracts, or oaths, as they have antecedently forbidden, may be placed in another light. An antecedent obligation will make void any subsequent obligation, which is contrary to it. But the civil law, which forbids the promise, or contract, or oath, and consequently the obligation of this law, is here supposed to be antecedent to the promise, or contract, or oath itself. The obligation therefore of the civil law will make void the obligation of any of these subsequent acts. You may perhaps reply, that the obligation of performing our promises, or contracts, or oaths, arises from the law of nature and of God, and that this law is antecedent to all civil authority whatsoever. But this suggestion, though it is true, is nothing to the purpose. For though the general obligation of performing our promises, or contracts or oaths, is antecedent to all civil authority; it will be no consequence, that the obligation of this particular promise, or contract, or oath, which the civil laws have forbidden, is likewise antecedent to all civil authority: unless you can shew, that the law of nature or of God has required you to make this promise, or to engage in this contract, or to take this oath in particular. If you can find any covenant, which the law of God requires you to engage in, such for instance as you will probably understand the covenant of baptism to be; I will allow, that no human authority can make void the obligation, that arises from such a covenant by forbidding it. But where the law of nature or of God, whilst it requires you in general to fulfil your promises, contracts, or oaths, has left you at liberty, as to any parti-

cular promise, contract, or oath, whether you will engage in it or not; there the civil laws can take this liberty from you; if it appears to be inconsistent with the common good of the society: and then the obligation of the civil laws, being antecedent to your engaging in such promise, contract, or oath, will make it void, if you should engage in it. For by the supposition of your being at liberty, by the law of nature or of God, to engage or not engage in this particular promise, contract, or oath, this law had laid you under no obligation to engage in it, and consequently had laid you under no obligation to keep it, antecedently to any appointment of civil laws concerning it.

There is rather more difficulty in understanding, how the act of the civil legislator can set the obligation of promises, contracts, or oaths, aside by a subsequent act; that is, by forbidding performance, after we have engaged in them; where no antecedent law has forbidden us to engage. † Grotius, in explaining this matter, lays it down as a general principle, that wherever an inferior enters into any obligation, such obligation must be a conditional one: an inferior, he says, has no power to bind himself without the consent of his superior: and upon this account every obligation of an inferior, if it does not express so much, must be understood to imply, that he consents to be obliged, provided his superior agrees to the obligation. But if our author, by making this a necessary condition in the promise, contract, or oath of an inferior, means, that no inferior can be obliged by any such act, unless his superior allows the obligation, either expressly by confirming it, or tacitly by not contradicting it; this principle is not universally true. This indeed is the situation of a slave: all his actions are subject to the authority of his master: no act therefore, which he does,



can be valid without the concurrence of his master. It is likewise the situation of children, who have not yet arrived at the use of their reason: all their actions, during this natural minority, are subject to the absolute control of their parents: they are therefore naturally incapable of binding themselves; unless their parents agree to the obligation either expressly or tacitly. But where the superiority is in its own nature a limited one, and extends only to some actions of their inferior; no concurrence of the superior, either express or tacit, is necessary to make such acts of the inferior valid, as are not subject to his jurisdiction. The mosaic law indeed gave the husband a power to make void any vow of the wife; or rather it placed the wife in such a state of subjection, that no vow of her's could be binding, if the husband declared, that he disallowed it. But without such a positive law, as this, many acts of a wife are naturally free from the jurisdiction of her husband; so that she is capable of binding herself without his concurrence. Now civil subjection is in its own nature a limited one: the members of a civil society are subject to the legislative power of it: but the purposes of the social compact, from which this subjection arises, determine it to extend only to such things, as are necessary or conducive to the common security or benefit of the whole or of its several parts. In all things, which have no relation to these purposes, the members of a civil society are free to act for themselves, and consequently have a moral power of binding themselves, without the concurrence of the civil legislator. If therefore the promise, contract, or oath is not contrary to some obligation of the social compact, there is no reason for supposing, either that any concurrence of the civil legislator is necessary to make the act binding, or that any want of such concurrence

would make it void. The civil legislator however, though he cannot make the act void by a mere declaration of his not consenting to it, may produce this effect by forbidding performance. When we are under any antecedent obligation, we have no moral power of binding ourselves to do what is contrary to this obligation. The law forbidding performance is here indeed supposed to follow the act, which it invalidates. But every member of a civil society is obliged by the social compact to obey all the laws of it, at what time soever those laws are made. And consequently, as we are members of a civil society, all our acts must be done, though not under a condition of their being binding, if the civil legislator consents to them, yet under a condition of their being binding, if he does not forbid them; because we have no moral power, or are not at liberty, to bind ourselves otherwise.

The reasons, upon which this principle is founded, will appear more plainly from observing what would be the consequence of supposing the contrary. If the civil legislator could not make void a promise, contract, or oath, by means of a law, which is subsequent to any of these acts; the subjects, or members of a civil society, would be able to exempt themselves from the obligation of all laws whatsoever, besides those, which are now in being. They might any of them bind themselves to one another, by promise, or contract, or oath, never to obey any future law, which made any alteration in the present state of things. Or if they knew beforehand what particular law was likely to be made, they might thus bind themselves to one another not to obey this particular law. Or in short wherever they had a private benefit in view, however inconsistent such benefit might be with the good of the public, yet if it was not forbidden by any law now in being, they

might in the same manner, bind themselves to one another never to give up this benefit, or never to obey any law, which should restrain them in their pursuit of it. And then upon supposition, that the civil legislator cannot make void these acts by any subsequent law, the subjects, who had entered into such engagements, would be discharged from the obligation of obeying all laws, which are contrary to these engagements: because such laws can bind them no otherwise, than by over-ruling the obligation of their promise, contract, or oath. If therefore you can find any reasons to satisfy yourself, that these laws would be binding upon them; the same reasons will serve to shew you in general, that civil laws can over-rule the obligation of promises, contracts, or oaths, as well by a subsequent, as by an antecedent act. The reason, upon which you would probably satisfy yourself in this case, is, that every member of a civil society has subjected himself by the social compact to the legislative power of such society; and consequently, whilst he continues a member, he is not at liberty, or has not a moral power, to do any act with effect, which will exempt him from the authority of this power. But you may observe, that this reason will likewise prove, that the civil legislator can by a subsequent act set aside the obligation of promises, contracts, or oaths in general: because, if any act of this sort was binding, when the civil law forbids performance, the person, whose act it is, would be thus far exempted from the authority of the legislative power.

You may perhaps find it difficult to reconcile this conclusion with a principle of natural law, which says, that no subsequent obligation can make void an antecedent one: for since the law, which forbids the performance, is, by the supposition, subsequent to the promise, contract, or oath; you may from thence be induced



to imagine, that the law cannot set aside the obligation of the antecedent act. Your mistake here is, that, because the law is subsequent to the promise, contract, or oath, you suppose the obligation of the promiser, contractor, or juror to obey such law to be likewise subsequent to these acts. Whereas his obligation to obey the law is antecedent, not only to the making of the law, but likewise to the acts, which are set aside by it. He could not indeed be specifically obliged to obey this law, before it was made : but he obliged himself in general to obey this and all other laws, whenever they should be made, by becoming a member of the society. For the obligation of all civil laws is founded in the obligation of the social compact : and it is this obligation of the social compact, which takes from him the liberty or moral power of obliging himself by any act, which shall be contrary, not only to the laws, that are already made, but to those likewise, that shall be made hereafter. He bound himself by the social compact to obey the laws ; and this obligation is antecedent to his promise, contract, or oath. All that the subsequent law does is to apply this general and antecedent obligation to some particular instance.

As the civil law may thus make void a promise, or a contract, or an oath, either by an antecedent or by a subsequent act, which affects the promiser, or contractor, or juror, immediately and directly, that is either by forbidding him beforehand to engage in such promise, contract, or oath, or by forbidding performance after he has engaged in it ; so likewise the civil law may make a promise, or a contract, or an oath void by an act, which immediately and directly affects the persons, to whom he promises, with whom he contracts, or for whose benefit he swears ; whilst it affects him, so as to discharge his obligation, only remotely and indirectly.

The manner, in which the law operates to produce this effect, has been already explained: if we make a promise, or a contract, or if we take an oath, by which any person acquires a right, and the civil law takes from him the right so acquired; this act of the law affects him immediately and directly; but at the same time it will remotely and indirectly affect us, and discharge our obligation: because where there is no right or claim on the one hand, there can be no obligation on the other.

What obligation to perform a void promise contract or oath.

XII. Here it may be asked, whether the civil law, when it makes void the promise or contract or oath of any person, discharges him from the natural obligation arising from such act, or only from the civil obligation; whether he is not obliged in conscience to performance, by the law of natural justice, notwithstanding he is not liable to be compelled to performance by the civil law? In answering this question, it may be proper to consider, whether his act was made void merely for his own benefit: if it was, and the law, whilst it offers him this benefit, does not compel him to accept it; he is then understood to be at liberty either to perform his promise, or contract, or oath, if he pleases, or to take the advantage, which the law gives him. Where the civil law has fixed the age of discretion at twenty one years, or at any other particular period of life, and makes void a contract of lending money to any person, who is under this age; it takes from such minor the liberty or moral power of binding himself by this contract; so that by making this contract he has done nothing. He cannot therefore be under any natural obligation of strict justice to pay it. He might perhaps, at the time of borrowing the money, be arrived at the use of reason: but till he is arrived at that point of life, where the civil law, to which he is subject,

has fixed the age of discretion, this law deprives him of the liberty or moral power of obliging himself: and since this operation of the law is a natural one, he cannot by any act of his own lay himself under a natural obligation of strict justice: because he wants such liberty or moral power. But as this contract was made void for the benefit of the minor; he is at liberty, when he comes to the age of discretion, to refuse this benefit, and to pay the money, if he pleases. From hence arises an obligation in conscience, though, as we have seen already, it is no obligation of strict justice. For every man of integrity and honour, where he cannot receive a benefit himself, without making some other person lose what that person might reasonably expect, will think it his duty, though it is a duty of the imperfect sort, to part with such benefit.

But where the civil law, when it makes a promise, or a contract, or an oath void, designs to hinder the benefit of the person, whose act is so made void, and by this means to prevent some harm to others; he is so far from being under any natural obligation, either perfect or imperfect, to perform what he had engaged to do, that performance of it is not a matter of indifference; he is not at liberty to perform it; and is guilty of injustice, if he does perform it. To suppose the contrary is to suppose, that a member of civil society may be obliged in conscience to obtain a benefit for himself, to which, by the laws of his country, he has no right, or to do some harm to others, from which, by the same laws, they have a right to be free. If a number of men, who have conspired together to do what the civil law forbids, bind themselves to one another for this purpose by contract or by oath, and the same law, which forbids such conspiracy, makes this contract or oath void; they could be under no



obligation in conscience to perform their engagement : because performance does not consist in giving up a benefit of their own, which they are at liberty to wave, if they please ; it consists in pursuing a benefit of their own, to which they have no right, and in obstructing a benefit of others, to which these others have a right.

The first occasion of the common mistakes in this matter, is an opinion ; that where the civil law makes any act void, it leaves us at liberty to judge for ourselves, as if we were in a state of nature, whether the law of nature would in the like circumstances bind us to performance : and that, if we find it would, we are to look upon ourselves as obliged to performance by natural justice. Whereas we should consider, not what the law of nature would bind us to, in consequence of a promise or contract or oath, if we were in a state of nature ; but what it binds us to, when we are members of a civil society, and under the jurisdiction of its laws ; we should consider, whether the law of nature requires performance, where the civil laws, which are founded in our own consent, have taken from us the liberty or moral power of binding ourselves. When a man by some previous compact, that falls within the notice of common observers, has parted with his right to bind himself by a second compact, which is contrary to the former ; if he should repeat the words or go through the forms of this second compact, we see plainly enough, that what he so does will stand for nothing, or will produce no natural obligation of justice. But this is the case of every member of a civil society, in respect of what is forbidden by the civil laws of it for the common or general good. These laws are founded in the original compact of social union, in which he made himself a party by becoming a member of the society. And though this is a remote compact, which does not fall within the notice of common observers, yet it

is a compact, and will naturally operate just as any other compact would. If the civil laws therefore, which are founded in this compact, have made a man's promise or contract or oath void; this act of the civil law as naturally takes from him his right of obliging himself to do what is contrary to the law, as if he had more immediately and directly given up his right by some private compact of the same tenor with the law itself. Where the civil law of a society has made void the promise, or contract, or oath of any person, who is a member of this society, we cannot, consistently with these principles, suppose, that he is as much obliged to performance by the law of nature, as if he had lived in a state of nature: because in a state of nature he might have had a liberty, or moral power, of binding himself to do what is contained in such promise, contract, or oath; whereas, when he is a member of a civil society, the law of nature considers him as already bound by the social compact to comply with the civil laws, and consequently as having no liberty, or moral power, of doing any act with effect, which those laws make void. You may say therefore, if you please, that where the civil law has made his act void, he is to judge of his obligation by the law of nature. But still I contend, that he is not to judge of it by what the law of nature would dictate in the like case, if he was in a state of nature, but by what this law dictates in consequence of his having already obliged himself by the social compact to obey the civil laws of his country.

Another occasion of the common mistakes in this matter arises from our not attending to the distinction already mentioned, between what the civil laws permit, where they make the act of any person void for his benefit only, and what they require, where they make it void for the purpose of hindering a benefit of his own which he had in view, and of securing others from some

harm, which they might suffer by his pursuing this benefit. When we find, that the civil law, whilst it makes void the promise or contract or oath of any person merely for his own benefit, permits him to preform what is contained in such promise contract or oath, if he chuses to wave his benefit, and to perform voluntarily, though his act is void, what he might have been compelled to perform, if it had been valid ; and especially when we find, that, in these circumstances, men of probity and honour esteem themselves to be bound in conscience to a voluntary preformance ; we first conclude, that this obligation in conscience must be a perfect obligation of natural justice ; and then we form a more general conclusion, that what we are obliged to do in cases of this sort, we are likewise obliged to do in all cases of void acts ; even in those, where our acts, in stead of being made void with a design of securing our own benefit, are made void with a design of hindering it, and of securing to others such benefit, as the law, which makes our act void, requires us not to deprive them of.

Effect of  
civil laws  
on the pro-  
mises &c.  
of kings  
who have  
legislative  
power.

XIII. <sup>t</sup> When Grotius proposes to enquire, whether kings can make void their own promises, or contracts, or oaths in the same manner, as they can make void those of their subjects ; he takes care to inform his readers, that he confines this question to kings, who are entrusted with legislative power. And in fact without such a limitation, here would be no question at all : because the acts of private persons are over-ruled or made void no otherwise, than by legislative power ; and consequently since they, who have not legislative power, cannot make void the acts of their subjects, they certainly cannot make void their own acts.

In regard to such civil laws, as immediately affect the subject, whose promise, or oath, or contract is made void ; they are either antecedent or subsequent to such

<sup>t</sup> L. II. C. XIV.



promise contract or oath. The first question therefore, concerning kings, who have legislative power, is whether by any antecedent law declaring, that all obligations entered into in such circumstances, or for such purposes as the law describes, shall be void, they can make void their own acts, as well as the acts of their subjects. Here Grotius distinguishes between such acts, as they do in their kingly capacity, by which he means their legislative capacity, and such as they do in their private capacity. Laws of their own making have no authority over them in their legislative capacity: because, if in this capacity they could not act freely, notwithstanding their own laws, they could not repeal those laws, after they have once made them. But since no promise, or contract, or oath of any person can be made void any otherwise, than by the act of a superiour, which takes from him his liberty or moral power of obliging himself: the consequence is, that the law of a king having legislative power, since he is not his own superiour, when we consider him in his legislative capacity, cannot make void any promise, contract, or oath, in which he engages in this capacity. Thus for instance, whatever exception there may be to the contract of a subject, upon account of the civil minority of the party contracting, that is, upon account of his being of less age, than the law requires to make him capable of binding himself; yet there is not the same exception against a contract of a king, if he has legislative power, and makes this contract in his sovereign capacity for the purposes of the state; notwithstanding he should be under the age, which the civil law has fixed as the limit of minority.

What has been here said proceeds upon a supposition, that no law has been prescribed by the society to their king, when he was called and appointed to his

office, and was intrusted with legislative power. Any laws, which came originally from the legislative power of the people, before they lodged the legislative power of the society in his hands, are binding upon him as compacts, to which, by accepting the crown under the limitations of these laws, he immediately and directly consented. Upon this account all promises or contracts or oaths of such king, if they are contrary to these laws will be void. By this compact he has given up his liberty or moral power of binding himself to do what these fundamental laws forbid: thus far therefore this compact may be considered as the act of a superiour; because it is a standing check upon his power.

But though a king having legislative power is not his own superiour, in respect of such acts, as he does in his legislative capacity, and consequently is not affected in these acts by his own laws; yet in respect of any other acts of a private nature, that is, of any acts, which he does as a part of the community, he is bound by his own laws. Grotius considers this obligation of a king having legislative power as an indirect one. Natural equity, or the nature of a civil society, requires, that all the parts of such society should conform themselves to whatever, in the judgment of the common understanding, is for the general good. When therefore the matter of any law, and the reason of it, is the same, whether it is applied to the king or to the subjects; such law, though it is of his own making, is binding upon himself: because, in respect of this law, he can only be considered as a part of the society; and it is as much for the general good, that he should comply with it, as that any of his subjects should comply with it. When he is considered in his legislative or sovereign capacity, he is superiour to every part of

the society : whatever laws therefore he prescribes to the society in general, they will affect all the members of it, to whom the matter or the reason of the law relates : and consequently he must be understood to design, that these laws should extend to all acts of his own, which are done by him as a part of the community, that is, to all acts of his own, where the matter and the reason of the law is the same, when applied to him, as when applied to any other part of the society. If the legislator by any antecedent law of this sort takes away from the other parts of the society their power of obliging themselves by an act, which is contrary to such law ; he is understood by the same law to take away his own power, or at least to renounce his own power, of obliging himself by a like act. Thus though a king with legislative power would be obliged to pay any debts, which he contracted for the public use in his sovereign capacity, during his civil minority ; yet his obligation to pay any debts which he contracted upon his own private account, would be void, in the same manner with the like obligation of any of his subjects ; that is, there would be no obligation of strict justice, but only an imperfect obligation of honour or of benevolence. In like manner a civil law, which makes marriages void, upon account of some defect in the form of the contract, or of age in the parties, will make void the marriage of the king though he had the whole legislative power ; if he had not taken care expressly to except himself out of the law.

" Grotius observes, that if a king having legislative power has only an usufructuary right in the crown ; that is, if the people have by a fundamental law of the constitution, reserved to themselves the right to dispose of the crown by a new election upon every vacancy, or have, by a like law, determined the future succession ;

" L. II C. VI. § XI,



he has, whilst in possession, no right to alienate by promise or contract or otherwise, any part of the patrimony of the crown. By the patrimony of the crown he means such lands or such revenues, as are annexed to the crown by some act of the society, for the support of the government or for the public purposes of the state. Such usufructuary kings have no other right in this patrimony, than they have in the crown, to which it is annexed. They have a right to the use and profits of it : but in the mean time the property of it is in the society. And since all alienations of a thing, which is not the property of the person who makes the alienation, are void ; any alienation of this patrimony will be void, if it is made by the king alone without the consent of the society, signified either by itself or by its representatives.

Our author observes farther, that this general rule does not admit of an exception upon account of the small value of the thing, which is alienated. A man has no more right to alienate what is not his own, where the thing is of small value, than where it is of great value. The only difference arising from the value of the thing alienated is, that where it is of small value, it is more reasonable to presume upon the consent of the people, from their silence or their not opposing the alienation, than where it is of great value : because it is more likely, that the people are willing to part with the one, than with the other.

But we are to distinguish between the patrimony of the crown, and the fruits or profits, which have accrued from that patrimony. For though the present possessor has no property in the patrimony itself ; yet, since the use and profits are his, he will have property in such profits as have actually accrued. And thus, whilst the patrimony itself is not alienable without the

consent of the society, such profits will be alienable by his own act. Thus the right to certain customs, duties, or tolls may be a part of the patrimony : but the money which has been already received from such customs, duties, or tolls is the fruit or profit of it. The right to receive and obtain property in confiscated estates may be a part of the patrimony : but estates, which have been already confiscated, are amongst the profits. But whilst we say, that these profits are alienable ; we should remember, that even in kingdoms, where the king has legislative power, such alienations may be prevented by fundamental laws ; and in other kingdoms they may be prevented by laws, which are made by the legislative body.

There is one contract, which Grotius says will be valid, notwithstanding the king has only an usufructuary right in the patrimony of the crown ; though it is a contract, which seems to dispose of this patrimony. A mortgage of such patrimony, to raise money for the service of the state, will be so far binding, that the society will be obliged to redeem it. But then he rightly adds, that this contract produces such an affect only in those kingdoms, where the king alone has a constitutional right to tax the people for the public service. In such kingdoms the society, as it is obliged to pay those taxes, which are laid upon it by the king, for the necessary purposes of government, will be obliged likewise to redeem the patrimony of the crown, when he has mortgaged it for these purposes : because such a redemption is in effect only the payment of such taxes. But this reason is plainly not applicable, where the king has no power to lay any taxes upon the subjects, besides what are proposed and consented to by themselves or their representatives. And consequently, in such mixed constitutions of go-

vernment, as he has no right to alienate the patrimony of the crown, so neither has he any right to mortgage it, by his own act.

\* Though a king with legislative power can, as we have seen, set aside the promises, contracts, or oaths of his subjects by a subsequent law forbidding performance; yet he cannot make his own acts void in the same manner: because this power, in respect of his subjects, arises from a principle, which cannot be applied to himself. A subject, as far as the ends of entering into civil society extend, has no moral power of obliging himself, but under a condition, either express or tacit, that performance shall not be afterwards forbidden by the civil legislator. But this condition cannot be supposed to be contained in the promise, contract, or oath of a king having legislative power: because he is not under the authority of any such legislator. His acts therefore, when he has once engaged in them, if they were not invalid from the beginning, must stand good; as far as they are consistent with the law of nature, and the compact, by which he holds his power. We have indeed distinguished above between the private and the legislative or sovereign capacity of such a king. But this distinction is of no use here: for the condition, which is the ground of the invalidity of promises, contracts, or oaths, when they are once engaged in, consistently with the laws then in being, can be no otherwise made intelligible, than by supposing the promiser, contracter, or juror, and the superior, who forbids performance, to be different persons: two different characters of one and the same person will not be sufficient to reconcile this condition with common sense. If we suppose the same person, acting in different characters, to have a power of undoing in his legislative character what he has done in his private

\* Grot. L. II, C. XIV. § III.



character ; his promise, contract, or oath with the tacit condition, in consequence of which it is supposed liable to be rendered invalid by some subsequent act of his own, will be to this effect — I consent in my private capacity to be obliged, if I consent hereafter in my legislative capacity ; which amounts only to saying, that I now consent to be obliged, if I consent hereafter.

But a civil legislator can release the members of the society from their promises, contracts, or oaths, not only by a direct act, which affects them immediately, but likewise by an act, which in respect of them is an indirect one, as it immediately affects the persons, to whom they are obliged, and affects them only remotely. This act of the legislator consists in taking away the claim, which arises from the promise, contract, or oath. It may therefore be asked, whether a king with legislative power cannot release himself by a like indirect act from his own promises, contracts, or oaths ; that is, whether he cannot by a law of his own making deprive the subjects of any claims, which they have acquired by his consent. Grotius replies to this question, that a king, with legislative power, has no right, by virtue of such power, to deprive his subjects of their claims ; whether they are claims upon himself or upon one another ; unless for the purpose of punishing those, who have deserved it, or for some other purpose of public utility. And if, for any such purpose of public utility, he deprives any particular subjects of their claims ; he is to take care, that the society should contribute towards making them amends : because, by the social compact, the obligation of advancing the public utility rests equally upon all ; and consequently the burden of advancing it cannot justly be thrown upon any one or upon a few. The master of a slave may, by the right of private despotism, deprive him of such claims, as are

contrary to his own benefit: because the end of this right is the private benefit of the master. But a king, whose power is as absolute, as the nature of civil power will admit it to be, has no such right: for though we speak of legislative power, when it is vested in one single person, as if it was absolute power, we only mean, that it is subject to no instituted or external restraints. It cannot be absolute in the full sense of the word, so as to mean a power of doing whatever the person, in whom it is vested, has a mind to do: because it is in its own nature a limited power; it is only a power of governing a civil society, that is, of directing such a society and all its members to what is for the general good, and of securing them in the enjoyment of all their rights, which are consistent with this general good. Whatever therefore a king with legislative power might be inclined to do, and whatever, with the help of executive power joined to legislative, he might in fact be able to do; yet certainly a power of directing a civil society and all its members to what is for the general good, and of securing them in the enjoyment of all their rights, which are consistent with this general good, can never give him a right to deprive them of any claims, which they have acquired by his promises, contracts, or oaths; unless where these claims are inconsistent with the ends of civil society.

Effect of  
civil laws  
on marri-  
age.

XIV. The law of God concerning marriage, whether we collect this law from the principles of right reason or from his revealed word has made this contract something different from others. It may therefore be proper to consider it separately, in order to determine, how far the civil law can make it void, either for want of age in the parties, or for want of some particular ceremonies either preceeding or attending the contract itself. Most of the questions that arise upon this head,

will be easily resolved, upon the same principles with these two, which follow. First; it is a question; whether the civil law is consistent with the law of nature and of God; if it fixes the age of consent for marriage at twenty one years, or at any other particular period of life, and enacts, that all marriages, which are solemnized without consent of parents or guardians, where both or either of the parties are under this age, shall be nullities from the beginning, or shall be void to all intents and purposes whatsoever. And secondly; it is a question, whether the civil law is consistent with the law of nature and of God; if it enacts in like manner, that all marriages shall be nullities, or be void from the beginning, to all intents and purposes whatsoever; unless previous notice is given, that such marriages are intended to be solemnized, and unless they are solemnized in a church or in some other particular place, which the law appoints. The same principles, that are to be made use of for resolving these two questions, will, if they are rightly understood, be equally applicable to all other questions of the like sort.

Our religious notion of marriage is contained in what Christ has declared concerning it. He has taught us, that when a man and a woman are bound to each other as husband and wife, they are to be deemed as inseparable, as if they were one flesh; that this was the original intention and appointment of God; and consequently that they who are thus joined together by his authority, cannot be put asunder by the authority of man. Our notions of marriage, as we collect them from God's natural law, are of much the same sort. This then being the law of God concerning marriage, we are to enquire, whether the civil law is inconsistent with it, when it enacts, that any marriages shall be void to all intents and purposes whatsoever, for want of some circumstances, which this law requires.



We have supposed the civil law to say, that all marriages shall be void, where both or either of the parties are under the age of twenty one years, if they are solemnized without the consent of the parents or guardians of the party so under age. Now a small alteration in the words of such a civil law would make it speak the language of the law of nature. <sup>y</sup> All marriages are void by the law of nature, if they are solemnized without consent of parents; where both or either of the parties are too young to be capable of judging and chusing for themselves. Till we arrive at the full use of our reason, nature places us under the authority of our parents, if they are living; and either by their act, or by the act of the law, our guardians succeed into their place, if they are dead. In this period of life, as we have no understanding of our own to judge and no will of our own to chuse, what is best for us to do, it is the duty of our parents to take care of us, and to contrive for our benefit: and this duty gives them a natural right to judge and to chuse for us. A male or a female, though they are under the age of discretion, may indeed be able to speak such words, or to act over such ceremonies, as custom has made expressive of consent to a bargain of cohabitation for the purposes of marriage. But since they are then under the authority of their parents, they have no moral power of acting for themselves, or no liberty of giving consent without the concurrence of their parents. These words therefore and these ceremonies, will stand for nothing; they will be attended with no moral effect, that is, they will produce no obligation. We may, if we please, give the name of marriage to what they have done, or rather to what they have attempted to do, by repeating such words, and by acting over such ceremonies. But if both the parties are too young to judge and to chuse for themselves, it will be a void marriage:

<sup>y</sup> See B. I. C. XV. § XIII.

because neither of them are capable of binding themselves to the other, as husband or wife, by their own act. Or if only one of them is under such incapacity, this will be sufficient to make the marriage void: because it is a well known rule in contracts, of the matrimonial as well as of any other sort, that there is no obligation upon either party, unless there is a mutual obligation upon both.

These are undoubted principles of the law of nature: and we nowhere find any positive law of God, which has changed or over-ruled them. He has nowhere enjoined, that, notwithstanding a male or a female are naturally incapable of binding themselves by any other contract without the consent of their parents, whilst they are under the age of discretion, they shall be deemed capable of binding themselves by a matrimonial contract. His revealed law does indeed say, and his natural law speaks to the same purpose, that, when a man and a woman are become husband and wife, they are as inseparable, as if they were only one flesh. But this law is nothing to the purpose in the question, which is now before us. We are not enquiring, whether a man and a woman can be separated from one another, consistently with the law of God, after they are become husband and wife; but whether there is any law of God, which has impowered a male and a female, whilst they are under the age of discretion, to make themselves husband and wife by their own act without the concurrence of their parents. It is granted, that the marriage contract is in its own nature perpetual and indissoluble, that they, who are joined together by the authority of God, cannot be put asunder by the authority of men. But it is not inconsistent with this notion of marriage to put a male and a female asunder, who come together under a natural incapacity of bind-

ing themselves to one another by a marriage contract : because it does not appear, that in these circumstances they are joined together by the authority of God. Though they make a bargain, or rather attempt to make a bargain, of cohabitation for the purposes of marriage in any words or according to any form whatsoever ; we know, that God's natural law declares such bargain to be a nullity ; and no positive law of God can be produced, which says the contrary. Thus far therefore the civil law would agree with our natural notions of the marriage contract, and would not contradict our religious notions ; if it was only to enact, that all marriages shall be void, which are solemnized without consent of parents, where both or either of the parties are under the age of discretion.

But we have supposed the civil law to enact, that all such marriages shall be void, where both or either of the parties are under the age of twenty one years, or some other particular period of life, which the same law fixes as the age of discretion. The only point, which remains to be considered in this change of the question, is, whether twenty one years of age can be fixed by the civil law as the age of discretion, consistently with the law of God : and this seems to be a point, which can scarce admit of any doubt. No law of God either positive or natural has fixed the precise age, at which all persons shall be deemed capable of acting for themselves, and be exempted from the authority of their parents. We are then capable of acting for ourselves, and are consequently then exempted from the authority of our parents, when we come to the full use of our reason. But since this may happen at different times of life to different persons, in different countries, or even in the same country, the civil legislator of any community is at liberty to fix that period of life, as the



age of discretion, at which experience and observation have shewn the judgment of those, who live in the same climate with himself, to be usually ripe.

Upon these principles the civil laws of our own country have long determined twenty one years to be the age of consent for other contracts; and the ecclesiastical canons have long considered all persons, till they are arrived at this age, as under the authority of their parents or guardians, in respect of the matrimonial contract. We may easily guess what principle our civil law proceeded upon, when it fixed the age of consent in matrimonial contracts lower than this, at twelve years for the woman and at fourteen for the man. Perhaps these ages might have been well enough fixed, if marriage had been ordained for no other end, besides the production of children, or for no other end, besides what might have been obtained without any understanding or judgment in the parties concerned. But we are taught, that it was ordained, as well for the careful education, as for the production, of children; as well for advancing the domestic happiness of the parties, as for satisfying their appetites in a regular manner, if they have not the gift of continence. And whatever other purpose of marriage a woman at twelve or a man at fourteen years of age may be supposed capable of answering; they are certainly not capable of answering these. The education of children, and the domestic comfort, which the husband and wife ought to have of each other, require more prudence, than is commonly to be met with at these respective ages. There seems indeed to be a sort of contradiction in the civil law of any country, if it allows a male and a female to be capable of binding themselves by a contract, in which they undertake the duty of educating children, at a time of life, when it considers them in other respects as

children themselves; if it allows them to dispose of their own persons for ever, at their own discretion, by a contract, upon which they stake their future ease and happiness, at a time of life, when it considers them as having too little discretion to be trusted with the disposal of five shillings without advice and direction.

There can be no possible grounds for imagining, that either the nature of the marriage contract, or any positive law of God concerning this contract, has restrained the civil legislator from confining the civil advantages of marriage to those marriages only, which are solemnized in such places and according to such forms, as he prescribes for the general good. The husband's claim to the wife's personal estate the wife's claim to dower, and some other claims of the like sort, are civil advantages of marriage, or advantages, which the civil law annexes to this contract. Amongst these we may likewise reckon the civil legitimacy of the children, that is, their claim to inherit or to transmit either honours or property in intestate succession. Such effects of marriage, as these were introduced at first, and are supported afterwards, only by civil laws, and not by any law of nature, or by any divine law of positive institution. And the same law, or rather the same legislative power, by which these claims were created, has an unquestionable right to regulate and to limit them. If therefore the civil law was only to say, that such marriages, as are solemnized without any previous notice, and such likewise as are not solemnized in a church, or some other particular place, which the law appoints, shall be void to all civil intents and purposes; there could be little reason to doubt of its consistency with the natural and the revealed law of God.

But we have supposed the civil law to go farther, and to enact, that such marriages shall be void, not only as

to all civil intents and purposes, but as to all intents and purposes whatsoever; by which we must understand the legislator to mean, that they shall give neither of the parties a right to the person of the other, nor be attended with any obligation on either side. Here the old question will return, whether a contract, which in its own nature is perpetual, can be dissolved by the civil law? whether they, who are joined together by God, can be put asunder by man? We cannot indeed deny the truth of the principle, upon which this question proceeds: but we may well maintain, that it is not applicable to the point in debate. The principle, upon which it proceeds, is plainly this;—When a male and a female are become husband and wife; the law of nature declares, that the contract, which made them such, is perpetual; and the revealed law of God speaks the same language, and declares, that no human authority can put them asunder. The point in debate is;—Whether the civil law can take from a male and a female the power of binding themselves to each other as husband and wife, by a matrimonial contract, according to any form, or in any place, that they please. The question therefore arising out of this principle, as far it is applicable to the point in debate, ought not to be;—Whether the civil law can dissolve a contract, which the law of nature has made perpetual; or whether they, who are joined together by God, can be put asunder by man? but;—Whether a male and a female can make any matrimonial contract at all, or bind themselves to each other as husband and wife; if, they proceed in such a manner, as the civil law has forbidden, and declared not to be binding. For if, when they have proceeded in such a manner, there is no contract, and the two parties are not husband and wife; it does not appear, that they are joined together by God: and consequently, as our



natural and religious notions of marriage would allow them to be put asunder, so our common notions of decency will inform us, that they ought not to come together.

In the liberty of nature, if a single man and a single woman of full age were to make a bargain of cohabitation for the purposes of marriage, either in a church or in any other place, either in the words and according to the forms, which are prescribed in our book of common prayer, or in any other words, and according to any other forms of their own chusing, which sufficiently express their free and mutual consent; such a bargain would be a good and a valid marriage; the two parties would be bound to each other as husband and wife; and when they are so bound, the law of God, as we either collect it from reason, or read it in his revealed word, has made the obligation perpetual. But when the man and the woman are considered as members of a civil society; we should observe, that the act of joining themselves to such society implies, that they agree to submit their rights or moral powers of acting at their own discretion, and amongst the rest their right of marrying according to what form and in what place they please, to be regulated and limited by the common understanding of the society, either for the public good of the whole body, or for the general good of its several parts. For though the law of God has established the perpetuity of the marriage-contract, and has by this means deprived the man and the woman of their liberty of parting from one another, after they are become husband and wife; yet it has not prescribed any particular place or any particular form for making this contract: so that the right of marrying in what place and according to what form they please, as it consists in a full liberty, is alienable

in its own nature, and is actually given up by the social compact, as far as the common understanding of the society shall find it to be necessary or conducive to the general good to restrain this liberty. Whenever therefore the laws of their country prescribe, that all marriages shall be solemnized in some particular place and according to some particular form, and enact, that no marriages solemnized in any other place or according to any other form shall be binding; the effect of such laws will be, that the man and the woman will have no right, or no liberty, or no moral power, of consenting to a marriage-contract any otherwise, than as the laws direct. If they make or rather attempt to make, a bargain of cohabitation for the purposes of marriage, in any other place or according to any other form; we may call this attempt a solemnization of marriage, for want of a better name for it: but in the mean time the bargain will not be binding upon either party; and what we call a marriage will be a mere nullity, upon the principles of the law of nature. For it is a known principle of the law of nature, that no person can be bound by any act, where he has no right, or liberty, or moral power of binding himself, that no words or ceremonies, however custom may have made them expressive of consent, can produce any obligation, where the person, who makes use of these words or ceremonies, has not the liberty of consenting. A man and a woman may repeat such words, or go through such ceremonies, as are expressive of their consenting to a bargain of cohabitation for the purposes of marriage; but no obligation will arise from the words or ceremonies themselves; where the parties had no moral power of consenting. If they had an intention of binding themselves to each other as husband and wife; this indeed implies the consent of their minds: and conse-

quently the words and ceremonies are in one respect not mere sounds and empty forms; because they are designed by the parties, who use them, to express this consent of mind. But if they had no liberty of consenting, then in respect of any effect or obligation, which might be supposed to arise from this act, they will be mere sounds and empty forms; they may express the consent of the parties, but it is such a consent, as produces no obligation. For the marriage contract is thus far like all other contracts; the natural power or intention of consenting does not make us capable of binding ourselves by this or by any other contract: we are no other wise capable of binding ourselves, than by having a moral power, that is, a right or liberty of consenting. We allow therefore, that when a man and a woman are bound to each other as husband and wife, the law of God forbids us to put them asunder; we allow, that, when a bargain of cohabitation for the purposes of marriage produces any obligation, the law of God makes this obligation perpetual. But in the mean time we affirm the effect of such a civil law, as we have been describing, to be, that, when a marriage is solemnized otherwise than the law requires, the parties are not bound to each other as husband and wife, the bargain, which they have made in words, is no bargain at all, and produces no obligation.

In short when we are examining either these or any other questions, which relate to the power of the civil law to annul a marriage once solemnized, we are apt to mislead ourselves by not taking the matter up high enough. By solemnizing a marriage we only mean, that a man and a woman have repeated such words or gone through such ceremonies, as custom or law has made expressive of a bargain of cohabitation for the purposes of marriage. When they have done this, we



suppose them to be bound to each other as husband and wife, without enquiring, whether they were capable of so binding themselves or not. And then upon this supposition, in which we take the very point in question for granted, we readily conclude, that they are joined together by God, and consequently that they cannot be put asunder by man. But instead of considering the effects of a good and a valid marriage, we should here consider, whether the marriage is a good and a valid one. If the male and the female are under the age of discretion, and are therefore subject to the authority of their parents; or if they are members of a civil society, and are therefore subject to the laws of their country; or if upon any other account they have no liberty or no moral power of consenting; such words or such ceremonies, as are expressive of consent, and in other circumstances would have produced a good and a valid marriage, will, in these circumstances, stand for nothing or have no meaning, and will produce no obligation. The male and the female therefore, by repeating those words and by going through those ceremonies, though this act, for want of a better name, is called solemnizing a marriage, will not have bound themselves to each other as husband and wife. But if they are not husband and wife, our natural or our religious notion of marriage is out of the question: if there is no contract at all, there cannot be any perpetual contract; if they are not joined together at all, they cannot be joined together by God; and consequently we can have no grounds for concluding, that they cannot be put asunder by man.

When a marriage is thus, to all intents and purposes whatsoever, made a nullity from the beginning by the act of the civil law; there can be no obligation of natural justice upon the parties to abide by the contract

and to cohabit as husband and wife. For if they have no right or moral power of consenting, they cannot lay themselves under any obligation of justice. And we have seen already that the civil law produces its effect, or makes the marriage a nullity, by taking from them their right or moral power of consenting. Indeed where the civil law only makes a marriage ineffectual for obtaining certain civil purposes, upon account of its wanting some forms prescribed by such law, but allows the validity of it as to other purposes; the parties are obliged in natural justice to cohabit, and their bargain of cohabitation is naturally a good marriage: because though, by a marriage contract, which wants those forms, they are incapable of obtaining the advantage annexed by the civil law to other marriages, in which those forms are observed; yet the same law, by allowing the validity of their marriage in other respects, leaves them at liberty to bind themselves to one another as husband and wife. But where the civil law of any society enacts that a marriage, for want of age in the parties or of certain forms in the contract, shall be void to all intents and purposes whatsoever; it does not allow the validity of such marriage in any respect, but renders the parties, who contract otherwise, than the law allows, incapable of so binding themselves to one another. And though this incapacity arises immediately from the civil law, yet since it arises ultimately from their own consent, as they are members of the society, it may properly be considered as an incapacity by the law of nature.

Some contracts, which the civil law makes void, are understood to oblige in conscience, though not in strict justice; they produce an obligation to performance, though it is not a perfect obligation. But this obligation takes place only in such contracts, as the civil law makes void for the benefit of one of the parties, and leaves

him at liberty, if he pleases, to wave this benefit. It cannot therefore take place in void marriages: because the civil law makes them void in order to hinder the parties from obtaining any benefit by them, and by this means to secure some benefit to others, in particular to the parents of one or both the parties, who might be made unhappy by an improper marriage of their children. This circumstance alone is sufficient to distinguish the case of a marriage, which the civil law makes void, from the case of a debt, which it makes void. But there is another very material circumstance, which puts a farther distinction between these two cases, and shews us, that, notwithstanding any obligation of the imperfect sort to pay a void debt, yet there is not the like obligation to cohabit upon a void marriage. What is contained in a contract of borrowing money might be performed by the borrower, though there was no contract at all. He might, if he pleased, give the lender the same sum of money, that he has borrowed, whether he had ever borrowed it or not. And consequently though the contract is a nullity, there is nothing vicious in the performance, merely for want of a contract. Whereas, what is contained in a marriage contract is unlawful, when there is no contract: for cohabitation without a marriage contract is naturally vicious. Unless therefore we will maintain, that where a man and a woman are incapable of binding themselves to one another, as husband and wife, by a marriage contract, they are capable of binding themselves in conscience to do what is vicious, we must necessarily allow, that they can be under no obligation to cohabit, as if they were husband and wife, upon a marriage, which the civil law has made void to all intents and purposes whatsoever.



The law of God concerning marriage produces its proper effect, not by making all persons, of any age or in any circumstances, capable of contracting a good and valid marriage, but by making all marriages perpetual or indissoluble, which have once been contracted by persons, who are of such age and in such circumstances, as to have the liberty or right of binding themselves by a marriage contract.

Civil laws set aside other contracts two ways, either by enjoining beforehand, that they shall not be made so as to obtain any effect; or else by enjoining afterwards, that they shall not be performed. No law of God either natural or positive has restrained the civil legislator from setting marriages aside in the former of these ways, by enjoining beforehand, that they shall not be solemnized with effect, or so as to bind the parties, in any other manner, than what the civil law prescribes. What the law of God enjoins is, that a marriage, which is solemnized in such a manner as to be once binding upon the parties, shall be of perpetual obligation. I do not say that the law of God enjoins this merely concerning a marriage, which is once solemnized. For solemnizing a marriage is an expression, which is used in two senses. Sometimes when we say, that a marriage is solemnized between a man and a woman, we only mean, that they have repeated such words, or gone through such ceremonies, as are expressive of a bargain of cohabitation for the purposes of marriage; whether any obligation arises from what they have done or not. Thus if a man whose wife is living and undivorced from him, should repeat such words and go through such ceremonies with a second woman; we should say that a marriage had been solemnized between the man and this second woman; though in the mean time we know that no obligation

of marriage arises from this act. But sometimes, when we speak of solemnizing a marriage, we use this expression in a stricter sense, and mean solemnizing it with effect, so that the man and the woman by what they have done are become husband and wife. If we have been brought up from our infancy in a country, where the civil law has allowed almost all marriages to be binding, provided certain words and certain ceremonies have been made use of; it is no wonder, if we should be led to think, that what we have long found to be the same thing in fact, is likewise the same thing in right; that solemnizing a marriage in one of these senses is solemnizing it in the other sense, that repeating these words and going through these ceremonies necessarily produces an obligation, and consequently, that to set aside a marriage once solemnized, is the same thing as to set aside a marriage, which has been so solemnized as to be once binding. But by attending to this distinction we may be enabled to see, what effect the law of God concerning marriage does not produce, and what effect it does produce. This law does not make all marriages binding, which have once been solemnized; it only makes all marriages perpetual, which have been solemnized in such a manner, as to be once binding. It does not make all words that express a marriage contract operate like a charm and bind the conscience, whenever they pass through the mouth; nor does it give those, who repeat such words, a liberty or moral power of consenting, in consequence of their being willing to be man and wife, that is, of their having a natural power of consenting; it only takes from mankind all right or authority to separate those, who being at liberty to consent, that is who being under no restraint, either from the law of God or of man, which might take away their moral power of consenting, have bound themselves to each other as husband and wife by a valid

bargain of cohabitation for the purposes of marriage. The civil legislator therefore has the same authority to make marriages void from the beginning, that he has to make any other contract void, by some antecedent law, which takes from the parties their liberty of consenting, or renders them incapable of consenting with any effect.

The only difference between the marriage contract and other contracts is; that other contracts, though they are valid from the beginning, may be rescinded or made void afterwards by some subsequent civil law, which forbids performance; whereas, when a marriage is solemnized in such a manner, as to be once binding, no subsequent civil law can rescind it afterwards by forbidding performance, consistently with the natural and revealed law of God, which has made this contract perpetual. When civil laws rescind other contracts by a subsequent act of the legislator forbidding performance, they produce this effect, consistently with the law of nature, by means of a condition, which is included in the obligation of every member of a civil society. This condition is, that he consents to be obliged by his contract, if the civil law does not forbid performance. The social compact, in which, as a member of the society, he is a party, makes such a condition natural: because by this compact he obliged himself to submit all his alienable rights, to whatever restraints and regulations, the common understanding should judge to be necessary for the general good. He cannot therefore, whilst he is under this obligation, that is, whilst he continues in the society, lay himself under any other obligation, which does not include this as a necessary condition. If our right, in respect of the marriage contract, was a right of full liberty; if we were originally free to chuse for ourselves, whether we



would make this contract temporary and precarious, or perpetual and constant; this right amongst others of the same sort would be alienable; the social compact would subject it to the civil power; and as members of a civil society we could only bind ourselves in marriage by a perpetual contract, upon condition that the civil law should not rescind it, after it is made. But our right in respect of the marriage contract is not a right of full liberty, the law of God has not left us free, when we bind ourselves by this contract, to make it either temporary and precarious, or perpetual and constant; we are at liberty on one the hand to bind ourselves by a perpetual contract, or not to bind ourselves at all: but if we chuse to make ourselves parties in this contract, we are not at liberty on the other hand, but are obliged by the law of God, to make it a perpetual one. We cannot therefore oblige ourselves to the contrary by the social compact; and consequently, when we consent to a marriage-contract, we cannot be understood to consent, that it shall be perpetual, upon condition of its not being rescinded afterwards. This condition takes place only in respect of such rights to bind ourselves, as are subjected to the civil legislator by the social compact: whereas the right to bind ourselves by a perpetual marriage-contract, if we bind ourselves by any marriage-contract at all, could not be thus subjected to the civil legislator, consistently with our obligation to obey the law of God.

XV. We commonly distinguish civil laws into written and unwritten: but we seldom form such precise notions of each, as will keep up the distinction, and shew us wherein the difference between them consists. Every rule of action, which is enjoined by a civil legislator and committed to writing, does not immediately become a written civil law. Such laws, as are establish-

Civil laws  
are writ-  
ten or un-  
written.

ed by long and uninterrupted usage or custom, may certainly be committed to writing, as well as any other: but this does not change them from unwritten into written laws. Every precept of unwritten law may be expressed in words: and whatever can be expressed in words may certainly be written down: and when any precept of unwritten law is thus written down, it will be as much a law, as it was before, and may be called a law in writing, if you please: but if you call it a written law; you will give it an improper name. We must therefore look for some other definition of a written law, besides the common one, which only says, that it is a law committed to writing. No rule of action, though it is prescribed by a civil legislator, and is committed to writing, can be called a written civil law; unless the writing contains all, that is essential to a civil law. Now the essence of a civil law consists in its being a rule of action prescribed by the authority of a civil legislator. If therefore the writing only contains the rule, which the civil legislator prescribed, but does not contain the evidence of its having been prescribed by his authority; that is, if such writing is not authenticated by him; it will not contain all, that is essential to a civil law, and consequently it can only be called a law in writing, but will be no written law. But by defining a written law to be a rule of action, which is prescribed in writing by a civil legislator, or which is prescribed by the authority of a civil legislator and is committed to writing by the same authority, we shall distinguish it from all those rules of action, which are prescribed by the authority of a civil legislator any otherwise, than in writing; though they should afterwards be committed to writing by some one else, who has not the same authority.

When civil legislators are professedly employed in making laws; instead of trusting their acts to the pre-

carious custody of unwritten tradition, they usually record, what they have done in writing; that so the several members of the society, who are concerned in the laws of it, may know both where to find them and what they are. Unwritten laws therefore either were not made at first by a civil legislator professedly employed in the business of legislation, but have arisen out of immemorial and uninterrupted usage and custom; or else, if they were made at first by a civil legislator professedly employed in this business, the evidence of their having been so made is lost, and they have only the authority of the like usage and custom to support them.

XVI. Whatever usage has obtained, in any civil society, for time<sup>y</sup> immemorial without being interrupted, may be presumed to be agreeable to the sense of such society, and to have obtained with its consent: because the usage must in so long a time have come to the knowledge of the public; and if the society had not consented to it, there must have been frequent opportunities either of interrupting it in fact or of declaring a dislike of it in words. But whatever is consented to by a civil society becomes a law of such society: and consequently any usage, which has obtained for time immemorial is established into a law by prescription. The particular consent of each member of the society is not necessary for the purpose of establishing any usage, or the rules arising out of any usage, into laws. For the general consent of the society binds each of its members: and any rules, which arise out of such usage, as has continued for time immemorial without being interrupted by any act of the public, become laws to all, whom the society intended to include within those rules. Unwritten laws will establish themselves in the same manner, not only in a perfect democracy, where the legislative

Unwritten laws  
how established.

<sup>y</sup> See B. I. C. VIII § I. V. VIII.



power is in the hands of the whole collective body of the society, but under such forms of government likewise, as commit this power to some particular legislative body. The standing legislator of a civil society, if he does not consent to any usage, which generally obtains amongst the members of such society, might at any time interrupt or stop it by forbidding it. If therefore it has continued long enough to be notorious, and is not interrupted by any act of his ; he may be presumed to consent to it: and this concurrence of the legislator thus collected will be sufficient to give it the force of the law.

But though the consent of a civil society, or of its legislative body collected from long and uninterrupted usage, establishes such usage into a general law ; yet a law so established admits of exceptions. It binds only those, whom the society intended to bind by it : for no positive law extends farther, than the intention of the legislator : and consequently if any particular customs, different from the general usage, have obtained without interruption, for time immemorial, in respect of particular persons, or places, or things, these customs will be exceptions to the general law, and will themselves be the laws of those persons, places, or things, in respect of which they have so obtained. These particular customs which are exceptions to the general law are established by the same means, and upon the same authority with the law itself, by the consent of the society or of its legislative body collected from its not putting a stop to them, notwithstanding they have obtained for so long a time, that they must in all probability have fallen under public notice.

Unwritten  
law more  
difficult to  
be ascer-  
tained  
than writ-  
ten law.

XVII. There is a plain reason, why it should be more difficult to find out what is prescribed by an unwritten law, than by a written one. The rules of un-

written law may indeed be committed to writing. But when they are, it will still be a question, whether such writing contains the law or not: because it, it will not appear from the writing itself, that it is authenticated, or that the rules, which it contains, are prescribed by any legislator. The law is founded in usage or custom only: and consequently it can only be collected from usage or custom. In the mean time the members of a civil society are not left to their own observations to find out the unwritten laws of it. The records of what has been done from time to time in courts of judicature are evidences of the unwritten law; not only as to the methods of preceeding in the court itself, but likewise as to those points, which have come into question before it. If the methods of preceeding in the court itself are grounded upon unwritten law, the law, which regulates its preceedings, having thus arisen out of its own practice, can appear only in its own records. The law, upon which any points of controversy have been determined by the court will likewise appear in the same records: because they shew what the usage and custom appeared to be upon the fullest information, that the court could get. When <sup>2</sup> Grotius therefore teaches us to have recourse, not only to our own observations, but to the judgement of others, who have had more and better opportunities than we have had, of making observations upon such general usage or particular custom, as has established itself into a law: he points out the principle, upon which the determinations of courts of judicature are to be received as the most authentic evidences of unwritten law. The principle is, that their determinations are authentic evidences of what the usage or custom appeared to be upon the exactest scrutiny.

<sup>2</sup> L. I. C. I. § XIV.

Unwritten laws  
how repealed.

XVIII. The unwritten laws of a civil society are sometimes repealed or altered by an express act of the legislative body of the society; that is, though they were established at first by usage or custom, they are sometimes repealed or altered afterwards by written laws. They may likewise be repealed or altered by long disuse or prescription: for as the consent of the society, upon which they are established, is collected only from the presumptive evidence of usage or custom; so a long and uninterrupted disuse affords the same evidence, that the society has consented to repeal or alter them.

Written laws cannot be repealed by prescription.

XIX. But if disuse repeals an unwritten law, only as it is a presumptive evidence that the society has consented to repeal such law; the consequence will be, that no written law can be repealed merely by disuse; <sup>a</sup> because no presumption can set aside a certainty: the record, in which the written law appears, is a certain evidence of its having been established by sufficient authority; whereas disuse affords at most only a presumption of its having been repealed by the like authority.

Written laws are indeed sometimes said to be grown obsolete. But then by their being obsolete we are not to understand, that they have ceased to oblige, whenever it shall be found necessary to put them in execution. Sometimes a written law is said to be grown obsolete, when the circumstances of those, to whom it relates, are so changed, that the execution of the law would be of no use, notwithstanding it might be a beneficial law at the time of making it. This happens more particularly, where the legislator had not the special matter of the law principally in view, but designed either to guard against some particular evil, which might, as he thought, probably be prevented, or to obtain some particular good, which might, as he thought, probably be advanced, by using such cautions,

<sup>a</sup> See B. I. C. VIII,



and by following such directions, as are prescribed by the special matter of the law. When the evil therefore, which was in view, is no longer to be feared, or when the good, which was in view, is effectually obtained, the law becomes useless. Sometimes, though the execution of the law would be of the same advantage now, as when it was first made, we say, that it is become obsolete; if it has not for any considerable time been put in execution, so that what it enjoins has been long neglected, or what it forbids has been long practised with impunity.

Where written laws are become obsolete in the former sense; it may with some reason be called a hardship, if it is nothing more than a hardship, to put them in execution. For since all civil laws either have, or ought to have, the prevention of some evil or the attainment of some good in view; it is scarce consistent with the nature of a civil law to lay any restraint upon the members of a society, or to punish them for not complying with any restraint, where no evil will be prevented or no good be obtained by their compliance.

But where laws are become obsolete, in the latter sense, either by any neglect of those, whose business it is to put them in execution, or by any other accident; if it can be called a hardship to put them in execution afterwards, the only ground for calling it so is a supposition, that through such long disuse many persons may be ignorant of what the law requires of them. This hardship is effectually prevented, if the civil magistrate, or executive body, gives public notice beforehand, that such a law will be put in execution: and though we usually say, that a notice of this sort revives an obsolete law; yet this revival is made without an act of legislative power: the law is then in being, and all the members of the society, that are concerned in it, are already bound to comply with it: the notice, which

the civil magistrate gives, only informs them of what, through long difuse, they might poffibly have forgotten.

General  
division of  
civil laws.

XX. Civil laws may be divided into three forts; they are either public, or private, or mixed. Public laws are fuch as have the civil power of the public for their object. Thefe laws may again be divided into fuch as are fundamental, and fuch as are not fundamental. Such public laws are called fundamental, as prefcribe the form and eftablifh the constitutional power of the legislative body of the fociety. Laws, which determine the form of the legislative body, and give one part of the fociety an exclusive right or power of legislation, cannot well be understood to have been derived originally from the legislative body itfelf. No part of the fociety has originally any exclusive right of legislation: this right or power, as it arifes out of civil union, is vefted in the whole collective body. And if no part has originally any right of this fort; it cannot acquire any fuch right by any act of its own; unlefs the reft concur in this act, and by fo concurring make it the act of the whole.

Laws of this fort are ufually understood to bind the legislative body itfelf, and not to be alterable by its authority. And for this reafon, when a legislative body, after it is eftablifhed, declares any law of its own making to be a fundamental law or a law of the constitution; the meaning of this declaration is, that the legislative body looks upon itfelf to be bound by this law.

But there are many laws in every civil fociety, which are public, though they are not fundamental, many, which relate to the civil power, though they are derived from the constitutional legislative body, and are at all times fubject to its authority. All laws, which regulate or refrain the executive body, either in the

internal or external branch of its executive power, are of this sort. Those laws are public but not fundamental ones, which determine the method of calling and appointing civil magistrates to their respective offices, which settle the extent and limits of their power, or which regulate the proceedings in courts of judicature; and those likewise, which fix the manner of raising, and and governing, and maintaining the military force.

Civil laws, which adjust the mutual rights and obligations of the members of a civil society in respect of one another, may be called private laws: because they relate more particularly to private persons. Of this sort are all such laws, as regulate the right, that a man has over his own person, or to direct his own actions; all such, as either determine the manner of acquiring, or holding, or alienating private property, or regulate the several limitations, to which private property is subject; and all such, as prescribe the form and settle the effect of promises or contracts or oaths, not only of those, by which private property or a right in things may be acquired, but of those likewise, by which one member of the society acquires a right over the person of another.

Those civil laws may be called mixed ones, which regulate and prescribe the mutual rights and obligations of the public, or society, and of the several members or private persons, who are under its protection. Of this sort are all such laws, as guard the common welfare by enforcing the duties, which we owe either to God or to ourselves; all such, as determine the right, which the public has over the persons of the subjects to demand their assistance, either in executing the laws within the society, or in defending it against its enemies from without; all such as prescribe what taxes, duties, or customs are to be paid by the sub-



jects, by adjusting the demand of the public upon the private property of the individuals, for the support of the government, or for maintaining the common security, and advancing the common benefit ; and all such likewise, as regulate and ascertain the special obedience, which the subjects owe to their established governours, to the same head we may reduce all criminal or penal laws in general ; because all crimes are offences of private persons against the public : and all punishment, in a state of civil society, is inflicted by the public upon private persons.

In some constitutions the civil laws of succession to the crown cannot be fundamental laws.

XXI. It may be a question, whether a civil law, which settles the succession to a kingdom, is a fundamental law or not. But unless this question is stated more precisely, it cannot well be understood : because in some constitutions it may, and in others it cannot, be a fundamental law. In order therefore to determine rightly upon this question, it will be necessary to distinguish between those kingdoms, in which the king alone is the legislative body, and those, in which he is only a part of such body, whilst the whole society, either by itself or by its representatives, is the other part. And if the king alone is the constitutional legislative body ; it will be necessary to distinguish farther between those kingdoms, which are, and those, which are not patrimonial.

First ; in a patrimonial kingdom, if the king is the sole legislative body, there is, by the supposition, no law at all, and therefore certainly no fundamental law which regulates the succession : because the law, which settled the form of government, and the compact made upon this law between the king and the people, are supposed to have given the king who is in possession, a power of chusing and fixing his successor. If any thing, which relates to the succession, can be cal-

ed fundamental, it is the obligation of the present possessor to leave the kingdom to his successor, in the same condition, in which he received it himself, that is, to leave it patrimonial without entailing it any farther, than upon the next immediate successor, by any law of his own making. As he received it in this condition from the people, he has no constitutional power of altering their act without their consent. And in fact, if he was to attempt to alter it, what he does would be prevented from producing any effect, unless he had the concurrence of the people: because whatever he does without their concurrence is done only by a law of his own making: and since he transmits his own legislative power to the next immediate successor, this successor will have the same right to alter this law, that he had to make it: the consequence of which will be, that the entail, which he introduces, cannot take place without the consent of such successor.

Secondly; if the law, which fixes succession to the crown, can be looked upon as fundamental, it must be in those kingdoms, in which the king alone is the constitutional legislative body, and the crown is made hereditary by the same act of the people, which appointed their king to be their sole legislator. On the one hand the king in possession, notwithstanding he is the sole legislative body, cannot change this law, without the consent of the people: because it was made originally by the legislative power of the society: and if it does not bind him as a law, yet it certainly binds him as a compact; because his immediate and direct consent to it is implied in his acceptance of the crown under the conditions, which the society has thus established. On the other hand, the people have by the same compact given up their legislative power to him, and consequently cannot without his consent repeal the

law of the succession, which they have once established. The reader will do well to remember here, that we are now only considering the constitutional right of the people, and not any natural right, which they may have in cases of necessity, or where the constitution is broken.

However, without having recourse either to the equitable exception of necessity, or to a breach of the constitution, if the king in possession and the body of the society concur in changing the law of the succession; there is no natural reason, why such a concurrent act should not be valid. For the notion of a fundamental law of any civil constitution does not consist in its being unalterable by any human power whatsoever, but in its being unalterable by the constitutional legislative body, where this body is only a part of the whole society. If there is any doubt, whether such a concurrent act can of right limit or alter the succession; this doubt must arise from a supposition, that the successors, before they come into possession, have acquired a right to succeed, which cannot without their consent be naturally taken from them. But it is evident, that if they, who would have succeeded, supposing the law had continued as it was, are yet unborn, they can have no right at all: and consequently no injury is done them, if the succession should, before they are born, be so limited or altered by the concurrent act of the king and the people, as to exclude them. The difficulty will be somewhat greater, if the successors are in being at the time, when this alteration is made. But there are two ways, in which we may explain this difficulty. In the first place, the supposed right of the successors is only an expectancy during the life of the present successor: this expectancy is supported by nothing but the law: it cannot become a right, in the



proper sense of the word, till it is accepted: and as long as the present possessor lives, there can be no acceptance on the part of the successor. If therefore the law, which supported the expectancy, is changed, before the demise of the present possessor; this expectancy can never become a right at all. Or otherwise. The successors must be considered either as parts of the legislative, or as parts, of the collective body of the society. But during the life of the present possessor, the supposition here made, that he alone is the legislative body, excludes them from being considered as parts of this body. And if they are considered only as parts of the collective body, the general act of the society concludes them, whether they immediately and directly consent to such act or not.

Indeed when we consider them only as parts of the collective body of the society, nothing but the general security or general benefit can justify a change of the succession: because the whole exercise of civil legislative power is to be directed by this end; whether that power is exercised to repeal an old law or to make a new one; whether it is exercised by the constitutional legislative body, or by the collective body, or by both of them together. For since a civil society has no other power over its members, whether they are the successors to the kingdom, or others of inferior rank, besides what was originally designed for the general security or general benefit; it has no right, either by making a new law or by repealing an old one, to take away even the reasonable expectancy of advantage from any of its members, unless the general security or general benefit requires that it should be taken away.

This account of what may be done in respect of the law of the succession to the crown, where the king alone is the legislative body, will shew us,

that this law is not a fundamental law of the constitution, but is liable to be changed by the legislative body, and may be changed by it, without breaking in upon the constitution; if the body of the society either by itself or by its representatives is a part of such legislative. Where the constitution has given the sole legislative power to the king; he alone cannot change the succession, which was settled by a law derived from the original legislative power of the society: because this law is binding upon him by means of a compact between him and the people, which as it established his right, established likewise the succession: and since he is only one of the parties to this compact, he cannot by any act of his own set the obligation of it aside. In like manner the collective body of the society is only one of the parties to the same compact, which vested the legislative power in him: and consequently as it cannot by any act of its own make this compact void; so neither can it make any law, which shall be binding, or repeal any, which was binding; because as long as this compact subsists, it has no legislative power. But neither of these reasons will hold in respect of a legislative body, of which the king is one part and the body of the society, either by itself or by its representatives, is the other part. For in such a mixed legislative, as this both the parties to the compact, which fixed the law of the succession, are always present: the king in possession is present on the one part; and the body of the society is present on the other part. If indeed the body of the society is itself distinguished into two parts; one of which consists of the select few called nobles, and the other of the bulk of the society, which is usually called the people; in all changes, that are made in the law of the succession to the crown, the concurrence of the nobles, when they are thus con-

sidered as a distinct part of the society, is as necessary, as the concurrence of the rest of the people ; because the change, if it is duly made, must be made by the joint act of all, who were parties in the compact, by which the succession was originally settled. No compact can be released, and no law can be altered, without the consent of all those, who are parties to such compact or without the concurrent act of all those, by whose authority such law was established. The consent therefore of the king in present possession, and of what is here called the people, either by themselves or by their representatives, will not be sufficient to produce a change in the succession without the consent of the nobles ; if they were distinct parties to the original settlement of it, and are not represented by the representatives of the people but where the general body of the society is thus distinguished into the nobles and the people ; if the constitutional legislative body consists of the king who is in possession, and the nobles, and the representatives of the people, there are always present in such a legislative body all the parties, who could be concerned from the first in any settlement of the crown : and consequently such a legislative body will have a power to limit or to change the succession for the general security and benefit of the society.

XXII. <sup>b</sup> We may now understand what sort of kingdoms Grotius is speaking of, when he enquires, who can decide a controversy, that arises in the lifetime of a king, between two or more claimants to the succession. In those constitutions where the legislative body consists of the king and the whole body of the society, acting either by itself or by its representatives, this can be no question. For since such a legislative body has a constitutional right of limiting the succession by a civil law ; there can be no doubt of its having a like

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civil law.

<sup>b</sup> Grot. L. II. C. VII. § XXVII.



constitutional right of putting an end to a controversy of this sort by the same means.

The inquiry therefore relates to those constitutions only, where the king alone is the constitutional legislative body. Grotius tells his readers in express words, that he had such a kingdom in his mind : and if he had not told them so, it might easily have been collected from the reason, which he gives, why the people could not decide this controversy, and interpret the law of the succession authoritatively, so as finally to determine which of all the competitors has the best claim. The reason, which he gives, is, that the people have by the constitution entrusted all civil jurisdiction to their king. What he adds farther would, if it was true, increase the difficulty. He supposes the civil jurisdiction to be given not only to the king, but to his family likewise ; so that the people or the body of the society, whilst any of this family are in being, can have no jurisdiction at all, either by themselves alone or jointly with the present possessor. But this supposition is not true : the several claimants, or any others of his family, have no civil jurisdiction in his life-time ; they have only an expectancy of such a jurisdiction ; and this expectancy will fail, if the law, which supports it, is altered before his death. However, the reason, which Grotius alledges, will conclude against the jurisdiction of the people to decide this controversy by themselves, or by their own authority, without this additional supposition : because, without considering the successors, the people have by the civil constitution vested the legislative power in the possessor of the crown for the time being.

As the people alone could not decide this controversy for want of legislative power ; so neither could the king alone decide it : because, as Grotius observes, the right to the succession is not subject to the jurisdiction of the pre-

sent possessor, unless in patrimonial kingdoms : in kingdoms, which are not patrimonial, if the king is the constitutional legislative body, the law of the succession comes originally from the people, and by compact between him and the people is made binding upon him.

But though the people alone cannot decide this controversy, for want of legislative power in general ; and though the king alone cannot decide it, for want of legislative power in this particular instance ; yet upon the principles, which have just now been explained, the present possessor of the crown and the body of the society together have a right to decide it by a joint act. For all the parties to the original compact, by which the succession was settled at first, are included in the king and the body of the society : and consequently whatever they do will be binding upon all.

## C H A P. VII.

## Of interpretation.

- I. *Interpretation what.* II. *Province of interpretation.*  
 III. *Three sorts of interpretation.* IV. *Rules of literal interpretation.* V. *Mixed interpretation where to be used.* VI. *Three topics of mixed interpretation.*  
 VII. *Words are to be construed agreeably to the subject matter.* VIII. *Words are to be so construed as to produce a reasonable effect.* IX. *Words of a law or other writing are to be construed by its circumstances.* X. *Strict and large interpretation what.* XI. *Meaning of the writer how extended by rational interpretation.* XII. *Meaning of the writer how restrained by rational interpretation.* XIII. *Scarce any laws but what naturally admit of rational interpretation.*

Interpre-  
tation  
what.

I. **A**<sup>a</sup> Promise, or a contract, or a will, gives us right to whatever the promiser, the contractor, or the testator, designed or intended to make ours. But his design or intention, if it is considered merely as an act of his mind, cannot be known to any one, besides himself. When therefore we speak of his design or intention as the measure of our claim; we must necessarily be understood to mean the design or intention, which he has made known or expressed by some outward mark: because a design or intention, which does not appear, can have no more effect, or can no more produce a claim, than a design or intention, which does not exist.

In like manner the obligations, that are produced by the civil laws of our country, arise from the intention

<sup>a</sup> Grot. L. II. C. XVI. § I.



of the legislator; not merely as this intention is an act of the mind; but as it is declared or expressed by some outward sign or mark, which makes it known to us. For the intention of the legislator, whilst he keeps it to himself, produces no effect, and is of no more account, than if he had no such intention. Where we have no knowledge, we can be under no obligation. We cannot therefore be obliged to comply with his will; where we do not know what his will is. And we can no otherwise know what his will is, than by means of some outward sign or mark, by which this will is expressed or declared.

From hence it appears, that the way to ascertain our claims, as they arise from promises, contracts, or wills, and our obligations, as they arise from instituted laws, is to collect the meaning and intention of the promiser, contractor, testator, or lawmaker, from some outward signs or marks. The collecting of a man's intention from such signs or marks is called interpretation.

II. <sup>b</sup> Words are the common signs, that mankind make use of to declare their intention to one another: and when the words of a man express his meaning plainly distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation. But sometimes a man's words are obscure; sometimes they are ambiguous; and sometimes they express his meaning so imperfectly, as either to fall short of his intention and not express the whole of it, or else to exceed his intention and express more than he designed. In any of these cases we must have recourse to some other means of interpretation, that is, we must make use of some other signs or marks, besides the words of the speaker or the writer, in order to collect his meaning. These other signs or marks are what Grotius ranks

Province  
of inter-  
pretation.

<sup>b</sup> Grot. *ibid.* § II. IV.

under the general head of probable conjectures. If we attend to this account of interpretation, to the end, that it has in view, and to the means, that it employs to come at this end, it will help us to distinguish interpretation from some other arts, with which it is frequently confounded.

Both the end and the means of interpretation will distinguish it from criticism. The end which criticism aims at, is to find out what were the words of a writer; whether for instance, the writing, that is before us, is forged or genuine; whether any parts of it, or at least any material parts, have been foisted in, or omitted, or erased, or altered. The end, which interpretation aims at, is to find out what was the intention of the writer; to clear up the meaning of his words, if they are obscure; to ascertain the sense of them, if they are ambiguous; to determine what his design was where his words express it imperfectly. Without enquiring what means the critic makes use of, we may be sure that they cannot be the same with those, that are made use of by the interpreter: for the interpreter's work does not begin, till the critic's is ended. We must be in possession of the writer's genuine words, before we can either shew from them what his intention was, or can have any grounds for calling in the assistance of conjectures to clear up their meaning, to ascertain their sense, or to determine, that the intention of him, who used them, is in any respect different from what they express. It is one thing to determine, whether a writing, that is before us, is the genuine will of the person, whose will it is pretended to be; and another to determine what was the intention of the testator in that will. The former of these points must be settled, before the latter can properly come into question. We might indeed be able to clear up the meaning of the person,

who dictated that writing; but this would not determine the meaning of the testator with any certainty; if there was any doubt, whether that writing was his genuine will, or not; unless this doubt was first removed.

Sometimes we are at a loss to find out a writer's meaning, merely because we cannot read his writing: this obscurity may be occasioned by his using either a cypher, or abbreviations, or a hand, that we are unacquainted with. But the clearing up such obscurities as these is not the proper object of interpretation. It is indeed the business of interpretation to find out the meaning or design of a writer. But then it supposes, that we are in possession of his words. And where we cannot read his writing, the difficulty of making out his meaning arises from our want of knowing what his words are.

It is not very easy to determine exactly, where the provinces of the grammarian and the lexicographer end, and the province of the interpreter begins. But though these provinces run into one another at their confines, they are distinct enough at their remotest extremities. The boy, who is learning the Hebrew language by the help of his grammar and his lexicon, is certainly not employed in the same province with the divine, who settles the intent of the levitical lawgiver. And yet the divine is frequently indebted to nothing else but his skill in the original language for his discoveries of the meaning of the law. Interpretation certainly supposes us to have a competent knowledge of the language, which the writer made use of, whose meaning we are to find out. Till we have acquired such a knowledge as this; we cannot say, whether his words are clear or obscure, whether they are ambiguous or precise. If we are able to read the cha-



acters, in which he wrote, or if what he has written is read to us by any one else; the words will be only empty sounds, and cannot convey any meaning at all. We may, if we please, call our own ignorance of his language and obscurity in his writing: but it is such an obscurity, as is not to be cleared up by the topics of interpretation, but by the lexicon and the grammar. We do indeed call a man an interpreter who translates what is spoken or written in a language, of which we are ignorant, into another language, with which we are better acquainted. But such a man only supplies the place of a lexicon and a grammar: and if we would speak distinctly and properly, he is rather to be called a translator, than an interpreter. He gives us the words of the speaker or of the writer; and then by means of the words, or of other conjectures, if such conjectures are necessary, we are to make out the speaker's or the writer's meaning. It seems to be an ignorance of the same sort, though in a less degree, which makes any writing obscure, where we have a competent knowledge of the language, but are not perfect masters of it. This happens sometimes even in our mother-tongue, in which, if there are no other words not generally understood, there are at least many terms of art, which are a sort of language by themselves, and are not fully understood by the generality of the people, but by such only, as have been employed in the trade or profession, or have studied the science, to which those terms belong. When a man's meaning, in what he speaks or writes, is obscure, because he uses such words as these; it can scarce be looked upon as the province of interpretation to explain it. The only way of clearing up the obscurity is to get a fuller knowledge of the language: this may be done by having recourse to those, who understand the terms of art or other words, that occasion

the obscurity: but then they, to whom we thus have recourse, only instruct us in the language, and may be looked upon as translators: because the instruction, which they give us, consists in nothing else but in substituting a word, that we do understand, into the place of another, that we do not understand. But since a technical or other dictionary would do all for us, that they do; if we will call this by the name of interpretation, we may as well give the same name to what we do, when we learn a language, of which we were totally ignorant before. In languages, of which we have a competent knowledge, but not so perfect a knowledge, as we have of our mother-tongue, this sort of obscurity is more frequent: and as we are rather indebted to nice observations of our own upon the language, than to a grammar or a lexicon, for the clearing up such obscurities; we look upon what we do, when we clear them up, as a sort of interpretation. But yet since these observations chiefly consist in comparing the sense, in which the same words are used upon different occasions; all, that they lead us to, seems to be nothing more, than the common use of words in the language of the writer. We are constantly making the like observations upon our mother-tongue in our daily practice without knowing that we do make them. And as study and attention fix them in our memories, when we make them upon other languages; so the frequency of them fixes them there, in the language of our own country.

There are indeed another sort of observations, which consist in etymological refinements. But these are as likely to mislead, as to assist us, in giving the proper sense to the words either of our own or of any other language. All words have their meaning originally from nothing else but the common consent of those,

who use them. Their true signification therefore is to be determined by this common consent, which must be looked for, not in the etymology of the words, but in common use and custom. We may take pains, or may amuse ourselves, in finding out the roots of words, and in deriving them from these roots by rules of etymology. But when we have done all, that we can do, in this way; an ordinary man, who has no other verbal learning, than what he has been furnished with by common discourse in the language, to which these words belong, will be more likely to give them their true sense, than we shall be with all our refinements. In dead languages this sort of learning seems to have some use. We are forced to have recourse to its help, where we can get no better: we are forced to guess at the sense of a word, which is used but seldom, or perhaps only once, by the sense of the root, from which that word is derived. But this can never be done with any appearance of reason, unless the root is used more frequently, than the word itself: because otherwise the sense of the root will be as uncertain, as the sense of the word. And even where the sense of the root is better ascertained, a few slight observations either upon our own language, or upon any other, that we are well acquainted with, will serve to shew us, that derivative words have often a very different sense, from what we should have imagined them to have, if instead of attending to their common use, we had attended only to their etymology.

However, though the mere translator is certainly employed in a different province from that of interpretation; yet since a more exact knowledge of language, than the grammar or lexicon can teach us, is frequently required to clear up the meaning of a speaker or a writer, where it is obscure; we may well consider this



knowledge as having a share in the business of interpretation.

III. Interpretation, as we have already defined it, consists in finding out or collecting the intention of a speaker or of a writer either from his words, or from other conjectures, or from both. It may therefore be divided into three sorts, according to the different means, that it makes use of, for obtaining its end. These three sorts of interpretation are literal, rational, and mixed. Where we collect the intention of the speaker or the writer from his words only, as they lie before us, this is literal interpretation. Where his words do not express his intention perfectly, but either exceed it or fall short of it; so that we are to collect it from probable or rational conjectures only, this is rational interpretation. And where his words, though they do express his intention, when they are rightly understood, are in themselves of doubtful meaning, and we are forced to have recourse to the like conjectures to find out in what sense he used them; this sort of interpretation is mixed, it is partly literal and partly rational; we collect the intention of the speaker or the writer from his words indeed, but not without the help of other conjectures.

Three  
sorts of in-  
terpretati-  
on.

IV. If the words and the construction of a writing are clear and precise, we scarce call it interpretation to collect the intention of the writer from thence. But the definition of interpretation will best inform us whether it is to be called by this name, or not. Interpretation consists in collecting the intention of a man from the outward signs, that he makes use of to declare his intention: it must therefore certainly be one branch of interpretation to collect his intention from his clear and precise words, as they lie before us. The only reason, that we can have to doubt, whether this is to be called interpretation or not, is, that we commonly

Rules of  
literal in-  
terpretati-  
on.

include something of art, or skill, or sagacity, in our notion of interpretation: and there does not seem to be any art, or skill, or sagacity, in finding out a man's meaning, where his words express it clearly and precisely. That this is the reason of our doubt appears from our readiness to give the name of interpretation to our collecting the intention of a writer from his words only; when there is any obscurity arising either from unusual words or from a perplexed construction, which cannot be removed without more skill in the language, that he writes in, than most people are masters of. But certainly if this is to be called interpretation, we may as well give the same name to our collecting of his intention from his words only, when there is no such obscurity: because though some art or skill is necessary to remove that obscurity, it is not properly the art or skill of an interpreter, but of a grammarian or a lexicographer. Sometimes however, when the intention of a writer is to be collected from his plain words, we call it interpretation without any scruple. Suppose, that we had a will before us, which is to be interpreted, and that I was to contend for a rational interpretation of it: if you were of a different opinion from me, you would express this opinion by saying, that we ought to follow the literal interpretation. Now as I, by contending for a rational interpretation, mean, that we are to collect the testator's intention from something else besides his words; you by contending on the contrary, that we ought to follow a literal interpretation, must mean, that we ought to collect his intention from his words only. Thus, though we doubt whether literal interpretation, which consists in collecting a man's intention from his words only, is to be called interpretation, when we consider it alone; we have no such doubt, when we come to compare it

with another sort of interpretation, which consists in collecting his intention from something else besides his words.

The principal rule to be observed in literal interpretation is to follow that sense, in respect both of the words and of the construction, which is agreeable to common use, without attending to etymological fancies or grammatical refinements. We have already seen the reason, why we are to attend rather to common use, than to etymology, in determining the signification of words. And if the reader understands what I mean by grammatical refinements, he will readily see a reason, why we are to attend to common use rather than to them. By grammatical refinements then I mean such rules of construction, as are not justified by the common usage of the language before us, and have nothing else to support them, but some groundless conjecture or some supposed analogy between this language and others. The rule when it is thus explained, will be found not to differ from one, which is more commonly laid down : we are usually directed in interpreting writings to follow the literal and grammatical sense, the literal sense, as to the words themselves, and the grammatical sense, as to the construction of them. In this rule, we are to understand by the literal sense such a plain sense of the words, as custom and usage has given them, and not such an etymological sense as fancy may have invented. And by the grammatical sense we are to understand that sense, which arises from such a grammatical construction, as the like custom and usage will support, and not that refined sense, which depends upon a construction supported only by such rules of grammar, as, instead of being copied from common use, are intended to overrule its authority.



The Locrians coming into the extreme parts of Calabria found the Sicilians in possession of it. But the Sicilians, being alarmed at their unexpected arrival, made a league with them, in these words — That the Locrians would preserve amity with them, and would allow them to enjoy that country in common with themselves, as long as they should tread upon this earth and have these heads upon their shoulders. The Locrians, when they came to swear to this contract, had first put earth in their shoes, and had privately fastened upon their shoulders heads of garlick. And as soon as they had taken the oath, they threw the earth out of their shoes and the heads of garlick from their shoulders; and upon the first opportunity drove the Sicilians out of the country. In common use the literal and grammatical sense of these expressions — As long as we tread upon this earth, and as long as we wear these heads upon our shoulders — are equivalent to our saying — as long as we live. The Locrians might indeed call their's a literal and grammatical sense. But it is such a literal and grammatical sense, as common usage knows nothing of. When Temures had artickled with the garrison of Sebastia, that no blood should be shed; he ordered all the prisoners to be burried alive. He might say, that he kept to the letter and to the grammar of his articles; for though he took away the lives of the prisoners he did not shed their blood. But—not to shed their blood;—when the words are understood according to such a literal and grammatical sense, as common usage has given them; does not barely mean—not to kill them by letting out their blood; it means — not to kill them at all in any manner whatsoever.

We may now perhaps be able to reconcile this seeming contradiction; that the literal and grammatical performance of a contract is not a due performance of it;

and yet that every contract is to be understood according to the literal and grammatical sense of the words, in which it is expressed. By the literal and grammatical sense we sometimes mean such a sense, as the words will just bear, and sometimes we mean such a sense as common use has given them. All contracts ought to be understood according to this latter sense, and a performance of them according to the former sense is not a due performance.

V. <sup>d</sup> Where the words of a contract, or of a will, or of a law, may be so strained as to admit of a sense, which, though it does not hurt the grammar and is not inconsistent with the letter, is such a sense as common usage will not justify; we can scarce call these words ambiguous. For words are then only to be looked upon as ambiguous, when they will admit of two or more senses, and either of these senses is equally agreeable to common usage. This is frequently the case; and when it is; instead of appealing to common usage, which is the sole principle of literal interpretation; we must have recourse to mixed interpretation, and must collect the intention of the speaker, or of the writer, partly from his words, and partly from other conjectures. When we have no reason to believe, that his words express his meaning imperfectly, that is, that they express either more or less than he intended; we are to look for his intention within the literal and grammatical sense of his words: but because his words will admit of two or more literal and grammatical senses; and common usage will not fix the precise sense, in which he used them; we must have recourse to other conjectures to fix it.

Mixed interpretations where to be used.

The ambiguity of a writing, whether it is a law, or a will, or a contract, depends sometimes upon the doubtful sense of a single word, sometimes upon the

<sup>d</sup> Grot. Ibid. § IV.

doubtful construction of a sentence, and sometimes upon a comparison of one part of the same writing with another, or of the writing, which is before us, with some other writing, which came from the same hand. If the law orders, that a person shall do a certain act within the space of two, three, or more months, from such a particular time; the intention of the law-maker is doubtful as to the time limited; and this doubt arises from the ambiguous sense of the single word month, which may mean either a calendar month, or a month consisting of twenty-eight days. Common use will not determine the sense for us: because in common use the same word is used in both these senses. I bequeath all my plate to my eldest son, except one thousand ounces, which I bequeath to my younger son, and direct, that the elder shall, within a certain time after my decease, deliver to the younger one thousand ounces of my said plate, of such sort and such pieces as he pleases. The construction of the sentence will make it doubtful which of my two sons the word — he — refers to, whether I intended to leave the choice of the sort and of the pieces to the elder or to the younger. The levitical law says—<sup>c</sup> If brethren dwell together, and one of them die, and have no son; the wife of the dead shall not marry without, unto a stranger; her husband's brother shall go in unto her, and take her to him to wife. If we were to read only this clause of the law, we should have no doubt about the meaning of the word — son, but should naturally conclude, that it is used in its common acceptation for a male child, and consequently that, though the deceased brother had a daughter, the survivor is bound to marry the widow of the deceased. But then, in the original language of the law, the word son is sometimes used generally to signify any child either male or female: and we find,

<sup>c</sup> Deut. XXV. 5.



that where a man died without a male child, the <sup>f</sup> same law, in another part of it, substitutes his daughter into his place and conveys the inheritance to her. From comparing these two parts of the law together it becomes doubtful, whether the word son, in the former of them, is used in its strictest sense for a male child only, or in its general sense for any child of either sex. The common use of the word will justify either acceptance: we must therefore have recourse to something else, besides the word, and the common use of it, to collect the intention of the law-maker.

When <sup>g</sup> Puffendorf is to shew, how a clause in a law, which is precise and determinate in itself, becomes ambiguous, by comparing it with some other clause either in the same law, or in a different law, which came from the same legislator; he makes use of such instances, as belong to another head. One law, says he, enacts, that a statue shall be erected in the gymnasium in honour of any person, who kills a tyrant. Another law enacts, that no woman shall have a statue in the gymnasium. Now it happens, that a woman kills a tyrant. Here indeed it will be a question, what is the intention of the law-maker, when such a case happens. But the question does not arise from any ambiguity, that there is in the words of either of these laws, when it is compared with the other. The words of each law are clear and precise, not only when the laws are considered separately, but likewise, when they are compared together. The doubt arises from the impossibility of complying with both the laws, in this particular case: and the question is, which of them we may neglect most consistently with the intention of the legislator. In this instance we are not to collect his intention, as we do in ambiguous laws, from mixed interpretation, so as to act up to his words, but to give

<sup>f</sup> Num. XXVII. 3.

<sup>g</sup> B. V. C. XII. § VI.

those words, which are doubtful in themselves, a precise and determinate sense by conjectures: we are left to collect his intention by rational interpretation, or from conjecture only: for whichever of the two laws we comply with, it is impossible, that we should in any sense act up to the letter or keep within the words of the other. Another of his examples is taken from a law, which by a particular accident clashes with itself, The law says, that a woman, who has been ravished, shall have her choice, either to compel the man, by whom she was ravished, to marry her, or to have him put to death. The same man has ravished two women. One of them demands him in marriage; the other demands his life. We may have an use for this example hereafter, but this is certainly not the proper place for it. The case here supposed does not make the words of the law ambiguous, but makes it impossible to comply with it in all its parts. The intention of the lawmaker is indeed doubtful. But this doubt does not arise from any ambiguity introduced into his words by the accident here supposed. The doubt is, which part of the law he would have us comply with, when we cannot comply with both. And this doubt is not to be determined, by settling the precise meaning of his words from conjecture. We here have recourse to conjecture for a very different purpose, for the purpose of finding out an intention, which is not expressed in his words, in any sense of them whatsoever. Grotius reduces all questions of this sort, to the head of <sup>h</sup> rational and not of mixed interpretation: he does not treat of them, when he is inquiring what conjectures are to be made use of to find out the intention of the lawmaker, where his words will admit of more senses, than one; but when he is inquiring how we are to find out what his intention is in some particular case, which makes it im-

<sup>h</sup> Grot L. II. C. XVI. § XXVII. XXVIII.

possible to act up to any intention, that the letter of the law expresses.

VI. In mixed interpretation, where the intention of the writer is expressed in his words, but the words are ambiguous and will admit of more senses than one, so that we are forced to have recourse to rational conjectures in order to determine, in which of the several senses the words were used;<sup>1</sup> the topics, from whence our conjectures are drawn, are either the subject matter of the writing or the effect, that it will produce, according as we construe it in this or in that sense, or lastly some circumstances, that are connected with it.

Three topics of mixed interpretation.

VII. <sup>k</sup> When any words or expressions in a writing are of doubtful meaning, the first rule in mixed interpretation is to give them such a sense, as is agreeable to the subject matter, of which the writer is treating. For we are sure on the one hand, that this subject-matter was in his mind, and can on the other hand have no reason for thinking, that he intended any thing, which is different from it, and much less that he intended any thing, which is inconsistent with it. If a truce is agreed upon for thirty days; the word — day — must mean a natural day consisting of twenty four hours, and not an artificial day, or that space of time, during which the sun is above the horizon. This latter sense is inconsistent with the subject matter of the agreement. For a truce is a continued cessation of arms: and there can be no continued cessation of arms for thirty days, unless it is for thirty natural days: because thirty artificial days are not a continued space of time, but are interrupted by as many nights. <sup>1</sup> When St. Peter had heard upon what occasion Cornelius had sent for him; he begins his discourse with saying, that God is no respecter of persons, but that in every nation, he that feareth him, and worketh righteousness is excepted with him. We may understand St. Peter to mean either, that persons of all nations, whether they receive or reject christianity, if they only

Words are to be construed agreeably to the subject matter.

<sup>1</sup> Grot. *ibid.* § V. VI. VII. <sup>k</sup> *ibid.* § V. <sup>1</sup> Acts X. 34. 35.



fear God and work righteousness according to the principles of the light of nature, will be alike rewarded by him in a world to come; or else that persons of all nations, as well as the jews, provided they are ready to do the will of God, were alike designed by him to be admitted into the christian covenant. The subject matter upon which the apostle was speaking, will determine us to give this latter sense to the doubtful expression of being accepted with God. The case before him was that of a religious gentile, who had been called by God to the knowledge and belief of the gospel, and was desirous, if it might be, of being instructed in that knowledge and of receiving that faith: at a time when the apostles as well as the other christian converts, were of opinion, that this was the particular privilege of the jewish nation. His intention therefore, if we judge of it by the subject, upon which he was speaking, must relate to such acceptance only, as consists in being admitted into the christian covenant. Whether God will reward those hereafter, who live according to the principles of the light of nature. though they reject the belief of the gospel, was a subject, that did not then come before him. If therefore, when he says, that in all nations they who fear God and work righteousness, are accepted with him, we suppose his intention to be, that whosoever lives according to the principles of the light of nature, though he rejects the gospel, shall be equally admitted to the future rewards of heaven, with those, who receive it; we give his words a groundless meaning; because we give them such a meaning as does not appear from this subject-matter to have been in the mind of the speaker.

Words are  
to be so  
construed  
as to pro-  
duce a  
reasonable  
effect.

VIII. <sup>m</sup> The second rule, in mixed interpretation, is to give all doubtful words or expressions that sense, which makes them produce some effect; this effect must in general be a reasonable one; and it must like-

wife be the same, that the lawmaker or the testator or the contractor intended to produce.

First; All doubtful words or expressions are to be taken in such a sense, as will make them produce some effect; that is, they are so to be construed, as to give them some meaning: for to take them in any sense, that will make them produce no effect, is in reality to give them no meaning at all. The rule therefore of taking all doubtful words or expressions in such a sense, as will make them produce some effect, amounts to the same thing, as if we had said, that all words are to be construed in such a manner, as will give them some meaning. Any other construction of them, instead of pointing out the intention of the writer or the speaker, supposes him to have used the word without any intention at all. If the testator, as we just now supposed, bequeaths all his plate to his elder son, except one thousand ounces, which he bequeaths to his younger son, and directs that the elder shall, at a certain time, deliver to the younger one thousand ounces of the said plate of such sort and such pieces, as he pleases; this rule would determine the intention of the testator to have been, that his younger son should have the choice of the sort and the pieces. The ambiguous words — of such sort and such pieces as he pleases — would in the contrary construction be needless, and produce no effect. If the choice had been intended for the elder son, the testator would have had no occasion to add these words. For by leaving all his plate to the elder, except one thousand ounces of it, which the elder within a certain time is to deliver to the younger, the sort and pieces to be delivered would of course have been at the option of the elder; since the younger would by the will have had no claim but to a certain weight of plate.

When therefore the testator goes on, and says, that it shall be of such sort and such pieces, as he pleases; to give these words any meaning or to make them produce any effect, which would not have been produced without them, it must have been the intention of the testator to transfer the choice to the younger from the elder, to whom of course it would have belonged, if he had not added this clause.

Secondly; ambiguous words or expressions are sometimes capable of two senses, and will produce some effect in either of the two. The rule then goes farther, and says, that the effect must be a reasonable one. No other effect can be supposed to have been in the speakers or writers intention; because no man can be supposed to intend what is absurd or unreasonable. We meet with an example in Puffendorf, which belongs rather to this head, than to that, under which he mentions it. Labeo having agreed by a league with Antiochus, that the latter should give up half his fleet, cut every ship in two. The words would perhaps admit of this construction, and would certainly produced some effect, if they were thus construed. But it is such an effect, as can never be supposed to have been in the mind of Antiochus, when he agreed to these conditions; because it is an unreasonable and absurd one. If the words will admit of this meaning, yet it could not be his meaning by agreeing to part with half his fleet, he cannot be supposed to have consented, that the half, which he parts with, should be understood in such a sense, as would in effect deprive him of the whole.

All civil laws and all contracts in general are to be so construed, where the words are of doubtful meaning, as to make them produce no other effect, but what is consistent with reason or with the law of nature. And where men live in a state of civil society all doubt-



ful words in any of their contracts with one another are to be construed in that sense, which will produce an effect that is consistent with the civil laws of the society, to which they belong. For where nothing appears to the contrary, the presumption is, that they meant what they ought to mean, or that they designed nothing, but what the law allows. Thus if the civil law has fixed the interest of money at five pounds, for the loan of an hundred pounds, for one year, and the lender stipulates for the payment of fifty shillings at the end of six months; we must here by the word—month—understand calendar months. The word indeed would produce some effect, if we were to construe it to mean months of twenty eight days or four weeks; but this effect would be inconsistent with the law: because it would make the interest higher, than according to the rate of five pounds for one year.

Thirdly; <sup>n</sup> Grotius ranks the reason of a law amongst those topics of mixed interpretation, which are drawn from its circumstances: but I should rather chuse to rank it amongst those, which are drawn from its effect. The reason or final cause of a law consists in the end, which the legislator intended to obtain, or in the effect, which he intended to produce, by making the law. And when we argue, that any ambiguous words, which we meet with in a law, must be understood in one particular sense, rather than in any other, which they might possibly admit of, because this particular sense is agreeable to the reason of the law; our meaning is, that in this sense of the words the law will produce the effect, which the legislator intended to produce by it.

The reasonableness of this topic of interpretation is evident. For since the reason of a law consists in the end, which the law maker intended to obtain, or in the effect, which he intended to produce by it; and since

<sup>n</sup> Ibid. § VIII.

he cannot be supposed to intend the end, without intending the means ; if we give his words such a meaning, as is agreeable to the reason of the law, or such a meaning, as will make the law produce the effect, which he intended to produce by it, we give them such a meaning, as is agreeable to his intention.

Our author cautions his readers not to confound the meaning of a law with the reason of it ; but he does not explain either the one or the other distinctly enough to point out the mark of difference between them. The meaning of a law is the design of the lawmaker in respect of what he commands or forbids. The reason of a law is his design in respect of the end or purpose, for which he commands or forbids it. If the words of a law, where it commands or forbids any action, will admit of more senses, than one ; this ambiguity renders the meaning of the law uncertain, or leaves it doubtful what action the lawmaker designed to command or to forbid. At the same time the reason of the law may be expressed in such clear and precise words, as to leave no doubt at all about the ultimate effect, which the lawmaker designed to produce, or about the end, which he designed to obtain, by what he has commanded or forbidden. The rule here is, that the meaning of the law is to be determined by the reason of it, or that the design of the lawmaker, in respect of what he commands or forbids by the law, is to be collected from the effect, which he designed ultimately to produce by it.

A leitical law, which has been already explained, will help to illustrate this rule. The law says — Thou shalt not take a wife to her sister to vex her, to uncover her nakedness besides the other in her life time.—Now the idiom of the original language has left the meaning of the law doubtful in respect of what is forbidden ; it

is not certain, whether the lawmaker designed to forbid the marriage of a man with the sister of his first wife in particular or whether he designed to forbid a marriage with any second wife at all, in the life-time of the first. But the reason of the law is expressed precisely enough to leave no room to doubt about it: whatever was here designed to be forbidden, the legislator in forbidding it designed to guard the domestic happiness of the first wife—Thou shalt not take a wife to her sister *to vex her*. If therefore we collect the meaning of the law from the reason of it, that is, if we give the doubtful words of prohibition such a sense, as will make the law produce the effect, which the legislator designed to produce by it; we must construe it to be a general prohibition of marrying any second wife in the life-time of the first, and not a particular prohibition of marrying the sister of such first wife: because her domestic happiness would be as likely to be disturbed; if her husband in her life-time married any second wife; as if he married her own sister.

Some caution however is necessary to be observed in applying this topic of interpretation. Before we attempt to determine the meaning of ambiguous words or expressions in any writing by arguing from the reason, upon which the writer proceeded, or from the end, which he had in view; we must take care to shew, as evidently as we can, that we are in possession of his true reason. For if there is any doubt about this point though the meaning, which we give to his words, may suit exactly with the reason, which we suppose him to have had in view; our interpretation will be as doubtful in the conclusion, as it is in this first principle. The safest ground to stand upon is what the writer himself affords us: when the legislator has plainly declared the reason of the law in the body of it; we may argue from



thence with certainty : but when we are left to collect it by some other means, the foundation of our argument will be only conjectural : and the justness of our interpretation of the law will depend upon the evidence, by which our conjectures about the reason of it are supported.

Words of  
a law  
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IX. There are numberless ° circumstances of laws, or contracts, or wills, which may help to ascertain the meaning of the writer where he has made use of any ambiguous words or expressions. Grotius divides these circumstances into two sorts, into such as are connected with the writing in origin only, and such as are connected with it in place as well as in origin. To these two sorts we may add a third : for there are some circumstances, which seem to be connected with a law, or a contract, or a will, rather in time, than either in origin or in place.

When the words of a law, or a contract, or a will, are capable of two or more different senses, so that the meaning of the writer is left doubtful ; what has been spoken or written by the same lawmaker, or contractor, or testator, upon some other occasion, is a circumstance of the doubtful writing. But whenever we alledge any thing as a circumstance of a doubtful writing ; and argue from it to ascertain the meaning of the writer ; it is necessary to shew, that the writing and what we so alledge have some connection with one another. For nothing, which is wholly unconnected with such writing, can either be made use of to explain any ambiguous words in it, or with any propriety be called a circumstance of it. The origin of what has been spoken or written by the lawmaker or contractor, or testator upon some other occasion, makes it a circumstance of the law, or contract, or will in question ; they had both the same origin, and are connected with one another by coming from the same person.

In doubtful matters it is reasonable to presume, that the same person is always in the same mind, where nothing appears to the contrary; that whatever was his design at one time, the same is likewise his design at another time, where no sufficient reason can be produced to prove an alteration of it. If the words therefore of any writing will admit of two or more different senses, when they are considered separately, but must necessarily be understood in one of these senses rather than the other, in order to make the writer's meaning agree with what he has spoken or written upon some other occasion; the reasonable presumption is, that this must be the sense, in which he used them.

We frequently apply this rule of interpretation in reading the works of any author either ancient or modern. If we meet with a passage, which is of doubtful meaning, we usually make him, if we can, a commentator upon himself, by comparing this with some other passage in his writings. And whatever we find to have been his meaning, where he speaks plainly, we conclude to have been likewise his meaning, where he speaks doubtfully.

The law of Moses says, — If thy brother be waxed poor and fallen to decay with thee, then thou shalt help him, a stranger or a sojourner, that he may live with thee: thou shalt not give him thy money upon usury, nor lend him thy victuals upon increase. Here it is a question, whether the legislator meant, that the Israelites should thus help a poor stranger, or that a stranger should thus help a poor Israelite. For the words, which are wanting to make the sentence complete may be so supplied, as to give it either of these senses. When I had occasion before to mention this law, I endeavoured to ascertain the meaning of it by the help of another, which came from the same legislator. — Unto

a stranger thou mayest lend upon usury, but to thy brother thou shalt not lend upon usury. This second law puts a difference between an Israelite and a stranger, in respect of lending money to either of them, by allowing the Israelites to lend upon usury to strangers, whilst it forbids them to lend upon usury to their brethren. We must therefore understand the legislator to mean in the former law, not that an Israelite should help a poor stranger by lending him money without usury, but that a stranger, who was permitted to live amongst the Israelites, should thus help a poor Israelite : because otherwise the two laws would be inconsistent with one another ; the legislator would in one of them expressly allow what in the other he expressly forbids.

When we explain a doubtful part of a law, or a contract, or a will, by the help of some other part of it ; the clause, which we make use of for this purpose, is a circumstance which is connected with the clause to be explained in place as well as in origin, as they both came from the same hand, so they are both found together in the same writing.

Grotius might perhaps consider the reason of a law, as a circumstance, which is connected with the law in place and origin ; because the enacting clauses of a law, and the reason, upon which it proceeds, may both be contained in the same writing. But this is not always the case ; a legislator sometimes only prescribes what is to be done or to be avoided, without mentioning any reason, why he prescribes it. And certainly the reason of the laws, when it is left to be collected by other means, and does not appear in the same writing with the law, cannot be considered as a circumstance, which is connected with it in place. Nor can the reason of the law be properly considered as a circumstance, which is connected with it in origin ; whether such reason



appears in the same writing with it or not. For the reason of the law arises from the nature of things or from the particular situation of those, who are to be directed by the law; whilst the law itself arises from the understanding and will of the legislator; it prescribes such a conduct, as in his judgement is most likely to be for the benefit of those, who are in that particular situation.

Contemporary practice is a circumstance, which is connected with the law in time. It may indeed be said to be connected with the law not only in time but in place too: for it consists in what was usually done in the place, where the law was made, at or near the time of making it. But this is not such a connection in place, as our author means, where he speaks of circumstances, which are connected with a law in place as well as in origin. He means, that a doubtful clause in a law and some circumstance, which will help to clear up the doubt, may be connected with one another by being contained in the same writing.

There are two sorts of contemporary practice; and either of them may be applied to the purpose of explaining any ambiguous words or expressions in a law. The first sort is the common practice, which prevailed amongst the people at the time, when the law was made. The second sort consists in what was done upon the law in the times immediately after the making of it. From the practice, which prevailed amongst the people at the time, when a law was made, we may with some degree of probability collect with what view it was made, what good the legislator designed to advance or to secure, and what harm he designed to prevent or to restrain. But this sort of contemporary practice, since this is the only use, that can be made of it in interpreting laws, is only to remote topic of in-

terpretation: it helps us in our conjectures about the reason of the law; and then from the reason of the law we ascertain the meaning of the legislator in any ambiguous words or expressions, that he has made use of. When I speak of what has been done upon a law, soon after it was made; I do not mean what has been done upon it by any court of judicature, which is an authorized interpreter of the civil laws of the society, where the law was made; but I mean the practice, which it produced amongst the people, or what was done in consequence of it by those, who were obliged, and might be supposed willing to comply with it. The practice of such a court of judicature, that is, its determination of any questions, which have arisen upon the law, instead of being means, which will help to interpret it, are themselves authentic interpretations of it. Thus far indeed the practice of such a court may be considered as a means of interpretation. Though the persons, who preside there in later times, may have the same authority to interpret a law, that their predecessors had; yet what their predecessors have done, who were contemporaries with the legislator, will help to guide them in the use of this authority: because it will shew them in what sense the law was understood by those, who had the best opportunity of knowing the true sense either by advising with the legislator himself, or at least by seeing the situation of things, which led him to make the law. In like manner the effect, which the law produced in the behaviour of those, who were obliged by it, and who lived at the time of making it, will help us to form a judgment about the meaning of the legislator, where his words have left it doubtful: both because they had an opportunity either of finding out the reason of the law by their own observations, or of hearing it in their discourse with others; and because it

is probable, that, if their practice had not been agreeable to the sense of the legislator, he would have taken care to correct it by explaining his meaning more precisely.

A topic, which is much the same with one sort of contemporary practice, may sometimes be applied to interpret wills or contracts: though perhaps, when it is thus applied, it cannot properly be called by the same name. In the interpretations of wills we usually consider the situation of the testator; what sort of persons he had about him; what their qualities, their conduct, or their characters were; what was his own temper and disposition; what views he had in general; and what views in relation to the persons, who were about him, in particular. By these means we are enabled to form probable conjectures concerning the reason of any disposition of his goods, that he has made by his will: and then the reason of the disposition assists us in finding out the meaning of the words, in which it is expressed. In like manner, where we are to interpret any ambiguous clause in a contract, we attend to the situation of the parties, to the inconveniences, which that situation laid them under, and to the advantages, which it held out to them; we consider their temper and character, and examine into every circumstance, which might probably influence them.

We cannot apply the other sort of contemporary practice universally to the interpretation of wills or of contracts. Laws operate at a distance of time: those, who live many years, after the laws were made, are obliged to act upon them, and are therefore concerned to know their true meaning. But in length of time the meaning of a law may become doubtful, though it was clear and precise, when it was first made. And since by looking back into the contemporary practice, that is, into the



practice, which the law produced in the first instance, we may see in what sense it was then understood; a view of this practice will be a means of removing any doubts about the sense of it, which are owing only to our remoteness from its original establishment. But the obligation of wills or of contracts is commonly a transient one; when they have been once duly acted upon, they have obtained the whole effect, which the testator or the contractors had in view. If any doubts therefore arise about the meaning of a contract or a will; they commonly arise in the first instance, when there is no practice of past times, upon such contract or will, which might help to remove the doubts. But sometimes things are disposed of by a will or a contract for purposes, that are of long continuance: of this sort are donations in perpetuity for charitable uses or for other purposes of the like sort. At a remote distance of time from the original benefaction, doubts may arise upon the words of the will, or of the contract, by which such benefaction is settled; either concerning the persons, who are to dispose of it; or concerning the persons who may claim it, or who are capable of holding it; or concerning the restrictions, under which it is to be taken or holden. Here is an opportunity of having recourse to contemporary practice, in the same manner, as we have recourse to this topic in the interpretation of laws. Though any practice, which began some time after the first settlement, will only shew their opinion who began it; and though their opinion is no more to be relied upon than our own; yet a practice, which began immediately with the benefaction, under the inspection of the benefactor himself, where the donation was made by contract in his life-time, or under the inspection of his friends, who lived with him, where the donation was made either by will, or by a contract,

which did not take place till after his death; such a practice as this may reasonably be supposed to have been agreeable to his meaning.

X. The words — strict or large, when they are applied to interpretation, are not always used in the same sense; that is, we do not always mean the same thing, when we speak of strict or of large interpretation. Strict and large interpretation what.

Sometimes common usage has given two senses to the same word, one of which is more confined or includes fewer particulars; and this is called its strict sense; the other is more comprehensive or includes more particulars; and this is called its large sense. Thus the word—warehouse—is sometimes used in a large sense to signify any place where a dealer in any sort of goods or wares lays them up, till he wants to bring them out into a place of sale: and it is likewise used in a strict sense to signify the very place of sale; and then is no otherwise distinguished from a shop, than as the former is a close and the latter an open place of sale. When we meet with a word of this sort in a law, and are doubtful in which of the senses the legislator used it, we must have recourse to some other marks, besides his words, to ascertain his meaning. Either of the senses is within the letter of the law: but because other marks must be used to ascertain the meaning of the legislator, besides his words, the interpretation is of the mixed sort. If we take the word in its more confined sense, we are said to interpret it strictly: if we take it in its more comprehensive sense, we are said to interpret it largely.

Thus far we keep within the letter, whether we interpret the law strictly or largely. But strict and large interpretation are frequently opposed to one another in a different sense. The words, of a law may sometimes express the meaning of the legislator imperfectly; they may in their common acceptation include either more or

less, than was contained in his intention. And as we call it on the one hand strict interpretation, where we contend, that the letter is to be adhered to precisely; so on the other hand we call it large interpretation, where we contend, either that the words ought to be taken in such a sense, as common usage will not fully justify, or that the meaning of the legislator is something different from what his words in any usage would import. What is here called large interpretation, is the same, that, in the general division, I have called rational interpretation. And what is here called strict interpretation includes both literal and mixed interpretation: for even mixed interpretation is so far literal, that it keeps strictly to the letter, without giving the words any sense, which common usage has not given them; it only ascertains the sense, in which the writer used the words, when common usage has given them more senses than one. But perhaps it would be more proper, when literal and mixed interpretation are thus distinguished from rational, to call the former close rather than strict interpretation, and to call the latter liberal or free rather than large interpretation. The reason, why the terms would be the more proper will appear, if the reader considers the different sorts of rational interpretation. Where we make use of rational interpretation: sometimes we restrain the meaning of the writer, so as to take in less, and sometimes we extend or enlarge his meaning, so as to take in more, than his words express. Now if all rational interpretation, or all interpretation, which deviates from the letter, was to be called large interpretation, the consequence would be, that, when we come to divide rational interpretation into its two sorts, we must say, that as one sort of large interpretation extends or enlarges the writer's meaning beyond the letter, so the other sort restrains his mean-



ing within the letter. And certainly a large interpretation, which restrains his meaning; if it is an intelligible expression, cannot be a very proper one. This impropriety will be avoided, if we call it close interpretation, when we keep close to the letter; and liberal or free interpretation, when we deviate from the letter, or do not confine ourselves to it. For then all rational interpretation will come under the notion of liberal or free interpretation: and there is nothing either unintelligible or improper in saying, that such interpretation, as is free, and does not confine itself to the precise letter, either restrains the meaning of the legislator within the letter, or enlarges and extends his meaning beyond the letter.

XI. <sup>p</sup> We have just now observed, that there are two sorts of purely rational interpretation: sometimes the meaning of the writer is extended, so as to take in more, and sometimes it is restrained, so as to take in less, than his words import in their common acceptance.

Meaning  
of the  
writer  
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tended in  
rational  
interpre-  
tation.

In order to extend the meaning of a writer beyond the precise or common sense of his words, we may argue from the reason or motive upon which he proceeded from the end, which he had in view, or the purpose which he designed to obtain. When we thus argue from the reason of a law or of a contract or of a will, and would extend the writer's meaning to any case, which is not included in his words; Grotius observes, that the case must be shewn to come within the same reason, upon which the law-maker, or the contractor, or the testator, proceeded. If it only comes within a like reason; this will be no evidence, that it is included in his meaning. There may be as much reason, why some other acts, which are not expressed in the words of a law, should be forbidden, as there is,

why those acts should be forbidden, which are expressed in the words of it: but no argument can be drawn from hence to prove, that such other acts are within the meaning of the legislator. One reason may be like another, or one reason may be of equal weight with another: but notwithstanding their likeness or their equality of weight, though one of them was in the mind of the legislator, it will be no consequence, that the the other must have been in his mind too. And certainly we can never argue, that his meaning ought to be extended beyond his words, upon a reason, which does not appear to have been in his mind.

But every writing, and every clause in a writing, whether it is, a law, or a contract, or a will, though it is not to be construed agreeably to the reason, upon which the writer might have proceeded, is certainly to be construed agreeably to the reason, upon which he did proceed. When we know what was the reason or final cause, which the writer had in view, what end he proposed, or what effect he designed to produce; and the meaning of the law, or contract, or will, if we were to adhere closely to the words of it, would not come up to this reason, or would not produce this effect; we may then conclude that his words express his meaning imperfectly, and that his meaning is to be extended beyond his words, so as to come up to this reason, or so as to produce this effect. For it is much more probable, that the writer should fail in expressing his meaning, than that his meaning should fall short of the purposes, which he designed to obtain.

Sempronius, who had said in his will,—I make Curius my heir, if the child, with which my wife is now big, should happen to die,—was mistaken in supposing his wife to be with child. And as no posthumous child is born, the heirs in intestate succession claim the estate:

because Curius, according to the words of the will, could only claim upon the event of such child's death. But though the words of the conditional cause include only this event of the child's death; yet the meaning of it may be extended so as to take in the other event of no such child's being born. For it is plain upon the face of the will, that, in the intention of the testator, Curius stands next to his own child: and consequently that his reason for adding this condition was to make a provision for his own child, and not for any one else, in preference to Curius. If therefore we make this clause operate so as to exclude Curius, though there is no posthumous child to be provided for, we shall give it such an operation, as is not agreeable to the intention of the testator. His words indeed are — If my posthumous child dies. But if we interpret his will by the reason, upon which he proceeded, his meaning is — If I have no posthumous child, that lives.

If the law has prescribed a particular method of recovering possession, where the owner of any lands has been turned out of them by force; it may be a question, whether the same method is to be made use of, where a number of armed men have taken possession of his field in his absence, who, upon his attempting to come into it, bid him come in at his peril, and he withdraws without persisting in his attempt? The words of the law may be urged on one side; because he cannot be said to have been turned out of his lands, as he was not upon them. But the reason of the law is on the other side. The end or design of it is, not merely to place him upon his own lands, but to give him possession of them. If therefore, where it speaks of his being turned out of his lands, we collect the meaning of it from this purpose; his being turned out of his lands, must mean, not merely his being put out of the lands themselves, but his be-



ing put out of the possession of them. And he is as much put out of possession, when he is hindered by force from coming upon them, as if he had been upon them, and had been driven off by force. What the law intends to restore him to, is what it supposes him to have been turned out of. But it intends, not merely to bring him into his lands again, but to bring him into the possession of them. When therefore it says,—if a man is turned out of his lands; it must be understood to mean,—if he is turned out of the possession of his lands.

<sup>a</sup> The Mosaic laws says, If a man shall open a pit, or if a man shall dig a pit, and not cover it, and an ox or an ass fall therein; the owner of the pit shall make it good, and give money unto the owner of them; and the dead beast shall be his. In our author's opinion the reason of the law will extend it, beyond the words, to any ditch or to any tame animal. But this may well be doubted of: because the same reason does not extend to all ditches and to all tame animals. A ditch may be intended as a fence for a man's grounds: and the law cannot be supposed, either to require, that a ditch, when it is made for this purpose, should be covered, or to charge the owner of the grounds with the loss of any beast, which falls into such ditch, in attempting to come into a place, where it ought not to be. If the owners of sheep, in the country where this law was made, were always used to have shepherds to take care of them; there is not the same reason, why the owner of a pit should be charged with the loss of a sheep, which falls into it, that there is, why he should be charged with the loss of any other tame animals, which usually stray without a keeper.

Meaning  
of the  
writer  
how re-  
strained in  
rational  
interpre-  
tation.

XII. <sup>r</sup> When we would restrain the meaning of a writer, and shew, that it is less comprehensive than his words, or that some particular case, which is included in

Exod. XXI. 28. &c.

<sup>r</sup> Grot. *ibid.* § XXII.—XXIX.

his words, is not within his meaning ; we must argue, either for an original or for an accidental defect in his intention ; either we must argue, that according to the state of things, which came within the notice of the law-maker, or testator, or contractor, at the time of making the law, or the will, or the contract, he could not intend originally to include the case in question, however he may have so failed in his expression as to include it in his words ; or else we must argue, that the case is an accidental one, which probably was not foreseen originally, and that, if the writer had foreseen it, if the present state of things had come within his notice, he would have limited his expression, and have particularly excepted the case in question.

In contending for an original defect in the meaning of the writer, the topics are the same with those, which we make use of in mixed interpretation ; we argue from the effect, from the matter, or from the circumstances. Under the first of these topics may be comprehended what Grotius considers as a distinct topic, and calls the reason or ultimate design of the writer. For when we argue, that a particular case could not originally be included in the meaning of the law ; either because some absurd consequence will follow from including it, or because some consequence will follow, which is inconsistent with the reason or end of the law ; we plainly argue in both instances from the effect : in the former instance we contend, that the effect, which would be produced, by including the case in the meaning of the law, will be contrary to reason in general, and in the latter we contend, that it would be contrary to the reason of the legislator in particular. Our Saviour proves from the reason of the law, that the fourth commandment, which prescribes the observance of the sabbath, admits of some exceptions, though the words of

the law are general. When he reasons from the practice of the Jews themselves, who upon that day led their beasts to water; his argument may seem to conclude in favour only of works of necessity: but when he reasons from the end of the law, that the sabbath was made for man and not man for the sabbath; the conclusion is more comprehensive, and takes in all works of pure charity.

The law says, that they, who in a storm forsake the ship, shall lose their right in the ship and the lading; and that such ship and lading shall be the property of them, who stay in it. A ship is quitted in a storm by all, who were in it, except one sick man, who was not able to get out; and the ship by accident comes safe into port. The sick man claims the ship as his own by the law, and the owner's claim against him. Puffendorf makes use of this as an example of mixed interpretation, where the particular sense, in which words of more senses than one are used, is to be ascertained. But it seems rather to be an example of rational interpretation, where the writer's words express his meaning imperfectly, and the sense of them being too general is to be restrained by the end, which he had in view. Staying in the ship are words, which if we adhere to the letter, have only one sense: but this sense is very extensive and would support the sick man's claim. The reason of the law, or the encouragement, which the legislator designed to give those, who would expose their lives to save the ship, is what limits this extensive sense of the words, and shews the legislator to have meant, not any staying in the ship, as his words, unless we were thus to restrain them by the reason of the law, would import, but a voluntary staying there for the purpose of contributing to save it.

Whatever case is not within the subject-matter of what is spoken or written is not within the meaning of



the speaker or writer ; though his words, if they were construed in their full extent, would include it : for nothing can be within his meaning, which was not in his mind ; and the subject-matter, upon which he spoke or wrote, is what his mind was employed about, at the time of speaking or writing. You sell me goods, and oblige yourself to defend me in the possession of them, under a certain penalty. If these goods are taken from me by force, and you refuse, upon my request, to defend me against such force, I have no claim to the penalty. By engaging to defend me in the possession of the goods, you could not mean to insure my possession against such accidents as these. For though the words have this extensive sense ; yet the subject-matter of the agreement limits the sense of them. In a contract, which transfers your right in the goods to me, this right is the subject-matter. Any loss of possession therefore in which this right never came into question, as it has no relation to the subject-matter of the contract, could not originally be included within your meaning.

The circumstances, by which the meaning of a law is so restrained by rational interpretation, as to exclude cases which are contained within the letter of it, are of the same sort, with those, which are made use of to settle the sense of an ambiguous word in mixed interpretation : they are such as are connected with it either in origin, or in place, or in time. Other laws, which were made by the same legislator, or some clauses in the same law, or the contemporary practice, by which is meant either the practice, which obtained at the time of making the law, and which the law was designed to prevent, or the practice which followed upon making it, among those, who were under its authority and were in all appearance disposed to comply with it ; any or all of these are circumstances, which will help to shew, whether the meaning of the legislator was as ex-

tensive as his words ; or whether any cases are to be excepted out of his meaning, which come within his words.

The arguments, which are drawn from these topics, sometimes conclude so strongly, that little can be said against them with any appearance of reason. But sometimes they may be so urged on both sides, as to leave room to doubt, on which side the truth lies. <sup>s</sup> Thus, where the law forbids or commands any thing in general words, and then goes on to enumerate the several particulars, which are included under such general words ; if it omits any one particular, it may be a question, whether the meaning of the legislator extended to this particular or not. Now this enumeration of particulars being a circumstance, which is connected in place with the general words ; as they are both found in the same law ; we may urge, that it was designed to explain the general words, and to shew how far the legislator intended to extend them, that, when he was, enumerating the several particulars, if he had intended to take in any others, besides what he has expressed, he would have mentioned them, as well as these ; and consequently that, however extensive the general words of the law may be in themselves, the meaning of the legislator must be limited to these particulars, which are contained in such enumeration. On the contrary, we might argue from the effect, according to the rules of mixed interpretation ; that, if any doubt concerning the legislator's meaning arises upon his words, we are to construe all his words in such a manner, as to give them some significancy and to make them produce some effect. But if no particulars are to be included within his meaning, besides those, which are expressed in the enumeration, his general words would stand for nothing, and no effect would be produced by them.

This argument will conclude most strongly, where the general words follow the enumeration. When the legislator begins his command or his prohibition with general words and then goes on to enumerate particulars; there is some ground for surmising, that the enumeration of particulars is designed to be explanatory of the general words, and that his meaning stops, where he stops in his enumeration. But if he first mentions a number of particulars, which he commands or forbids, and then concludes with such general words, as will extend in their common acceptance to some other particulars not expressly mentioned; it seems to be a more reasonable supposition, that he apprehended it to be possible for him to have overlooked several particulars, which he intended to include within the law, and that he added these general words with a design to take in all such particulars, as he might have overlooked. And even where the general words stand first, though the enumeration of particulars, which follows them, must be allowed to be explanatory of such general words; yet there is no necessity for supposing, that the meaning of the legislator extends no farther than the particulars, which he enumerates. He might design to explain, not the extent of the law, but the matter of it, to shew, not what number of cases, but what sort of cases, was within his meaning. Now a few instances would be sufficient to explain the matter of his law and to shew what sort of cases come within the meaning of it. He might therefore leave his enumeration imperfect; not because his meaning stopped, where he stopped in his enumeration; but because such an imperfect enumeration would answer the purpose, for which he designed it. <sup>m</sup> The law of Moses commanded, that three cities should be set apart in the midst of the land, that every slayer might flee thither. And this is the case of the slayer,

<sup>m</sup> Deut. XIX. 3. 4. 5.



which shall flee thither, that he may live : whoſo killeth his neighbour ignorantly, whom he hated not in time paſt. Thus far it is plainly the intention of the law-maker that every perſon, who killed another in any manner, if there was no malice, ſhould ſuffer no puniſhment, provided he took refuge in one of thoſe cities of protection. But the law, after it had ſaid this in general words, proceeds to mention a particular inſtance. As when a man goeth into the wood with his neighbour to hew wood ; and his hand fetcheth a ſtroke with the ax to cut down the tree ; and the head ſlippeth from the helve, and lighteth upon his neighbour, that he die ; he ſhall flee unto one of theſe cities, and live. One can ſcarce imagine, that the legiſlator mentioned this particular caſe with a deſign of limiting his meaning to this caſe only. He did indeed deſign, that it ſhould be explanatory of his general words : but then he deſigned to explain by it, not the extent, but the matter of the law, to ſhew what ſort of caſes, and not what number of caſes. his meaning took in. But we ſhould obſerve in the mean time, that the force of this argument is greatly abated, where the law, inſtead of contenting itſelf with mentioning a few caſes, mentions a great number. The more perfect the enumeration is, the more likelihood there is, that the legiſlator deſigned to limit his meaning to the particulars, which are enumerated. If he only deſigned to explain the matter of his law, or to point out the ſort of caſes, to which it belongs ; a few particulars would be ſufficient for this purpoſe. When therefore he enumerates many, it becomes likely, that he did not deſign to answer a purpoſe, which might have been answered with leſs trouble ; but that he deſigned to mention all the particulars, to which the meaning of the law extends. What is thus urged in abatement, though it may have weight, where the enumeration of particulars follows the general words, will, for a reaſon,

which has already been taken notice of, have little or no weight, where the general words follow the enumeration of particulars.

Many more examples of the like sort might be produced: but this, which we have been explaining, will be sufficient to shew the reader, that the common topics of interpretation may frequently be alledged on both sides with such an appearance of probability, as will make it difficult to come to any certain conclusion on either.

Sometimes a case is to be excepted out of the meaning of a writer, though no original defect of his intention can be shewn. The state of things, which fell under the notice of the legislator, at the time of making the law, may possibly afford no evidence, that he did not intend from the beginning to include the case in question within the obligation of the law; whether we were to argue from the effects, from the matter, or from the circumstances. We must then have recourse to the present state of things, and must endeavour to prove, that the law is more extensive, than the legislator would have made it, if he had foreseen the accidents, which have happened since it was made; that it was adapted to the state of things, which he had before him; but that the present state of them in this particular instance is such, as makes it reasonable to believe, that, if he had been aware of it, he would have either expressly excepted the case in question out of the law, or would have otherwise provided for it.

The like method of reasoning may likewise be applied to wills and to contracts. Though the words of the will, or of the contract, may include the case in question, and though no original defect may appear in the intention of the testator or of the contractors, which might exempt this case from the general obli-

gation produced by the will, or the contract; yet we may argue, that the reason, why no such defect appears, is, because the testator or the contractor proceeded upon the state of things, which was then before him; and that, if he had been aware of what might arise afterwards, if he had seen things in the same state, in which by accident they are now placed, he would have added some clause in favour of the case now in question.

Great caution is necessary, when we thus put ourselves into the place of the law-maker, or testator, or contractor, and undertake to determine what they would do, if they were to declare their own meaning in a case, upon which they have not already declared it. There will otherwise be some danger of our overruling their act and setting it aside, under the notion of declaring what they would chuse to have done upon it. The proper qualifications for such an hazardous undertaking are an exact knowledge of equity, and a firm resolution, as well as a sincere inclination, of determining according to it. For whatever grounds there may be to presume, that the law-maker, or the testator, or the contractor, would be disposed to except any case, if it is equitable, that such case should be excepted; yet we shall be unqualified to act upon this presumption, or to determine what cases are to be excepted upon this principle; unless we know what is equitable. Nor will our knowledge alone make us fit to judge about the mind or intention of others, where they have not declared or signified it in words; if we are either corrupt or timid: though we know what equity would dictate, we shall probably determine contrary to its dictates; if we are liable either to be biased by interest, or affection, or to be over-awed by threatenings. By equity is here meant a fair and honest correction of a law, or a



will, or a contract; where it appears, that the law-maker or the testator, or the parties in the contract, either would or ought to consent to such a correction, if they were to interpret their own act.

Under this head of interpretation, we argue, either that the accidental case in question ought in reason to be excepted, or else that it must of necessity be excepted, out of the law, or the will, or the contract; though the writer has neither added, nor intimated any exception in favour of it.

When we argue, that an accidental case ought in reason to be excepted; the principal topic is the hardship, which must be suffered, if it is not excepted. It is unjust to bring any evil upon a man, and unreasonable to deprive him of any benefit, where no good at all will be produced, or even where no such good will be produced, as is of equal importance with the evil, that he suffers or with the benefit, that he loses. Since therefore the law-maker, or the testator, or the parties contracting, may be presumed not to have intended, because they ought not to have intended, any thing, which is unjust or unreasonable; we may conclude, that any case is to be excepted out of a law, or a will, or a contract, in which if it was not excepted, a man must either suffer some great evil, or be deprived of some great benefit, either for no good purpose at all, or for a purpose, which, though it may be a good one, is of less importance, than the evil, which he is to undergo.

Cicero mentions a case, arising upon a law of the Rhodians, as an example of such equitable interpretation. The law says, that any ship of force, which comes into any of their ports, shall be confiscated. A storm drives a ship of force into one of their ports notwithstanding all the endeavours of the sailors to prevent it. The officers of the state claim the ship as confiscated by

the law. But however such a claim may be supported by the letter, it cannot be supported by the equity of the law. The legislator may have made no express exception in favour of such a case : but it is to be presumed, that he never designed what was unjust or unreasonable ; and consequently that he would have excepted it, if he had foreseen such a case, wherein a grievous hardship may be suffered for no purpose at all. And certainly no purpose can be answered by punishing those, who have broken the law against their wills ; because where there is no disposition to offend, there is no future danger to be guarded against.

Grotius here excepts against a rule, which Cicero has laid down, that such a promise is not to be performed, as brings more damage to the promiser than benefit to the person, to whom the promise was made. For the promiser is not at liberty or has no right to judge concerning the benefit, which would arise to the other party from his performance. Thus far however Cicero's rule may be admitted. Though the promiser is not at liberty to determine concerning the benefit, which would arise to another from his performance, and consequently cannot release himself from his own obligation ; yet in civil society, where there is an authorized judge between them, such judge may proceed upon this rule, and may determine, that the person to whom the promise is made, ought in equity to release the promiser ; if he finds, that any unforeseen hardship would arise from performance ; and particularly if it appears, that by means of some accidental change, which has happened in the state of affairs, since the time of making the promise, performance will be attended with more harm on one side, than benefit on the other.

It may not only be reasonable, but necessary, to except an accidental case out of a law or a contract ;

though there does not appear to have been any original defect in the intention of the law-maker or of the parties contracting, that is, though they cannot be shewn to have designed from the beginning to except that case. The general tenor of a law or a contract may be consistent with the law of nature: and yet such cases may arise accidentally, as will render it impossible to comply with the law, or to perform the contract, without transgressing the law of nature. It is necessary to except such cases, as these, when they happen to arise; whether the legislator or the contractors originally excepted them or not. For the legislator, as he has no power to oblige others, and the contractors, as they have no power to oblige themselves, to act inconsistently with the law of nature, certainly ought, and may therefore reasonably be presumed willing, to except them. Grotius explains his meaning by the instance of a charge, which is a contract of the beneficial sort, and obliges the person, who receives any goods into his custody, to keep them safe, and to return them, either upon demand or at the time agreed upon, to those, from whom he received them. But if goods are thus left in charge with me, and before they are demanded by those, who left them with me, it appears, that they had stolen the goods, and the true owner demands them of me; the obligation of my contract, by this accident, becomes inconsistent with the obligation of the law of nature, which arises from the owner's property. And this exception, though it was not expressed in the contract, must be allowed of, when the case happens: because I ought not, or rather had not power, to bind myself to do what the law of nature has forbidden.

Where two civil laws, which come from the same legislator, relate to the same subject-matter, and are contrary to one another; so that both of them cannot



be complied with at any one time or place, or in any circumstances; the rule is, that the latter of these laws repeals the former. The legislator could not at one and the same time intend contrarieties. But when he established the second law, he intended, that it should be complied with: and consequently he must then intend to over-rule the other. In like manner, where two contracts, which are entered into at different times, are in all respects inconsistent with one another; so that the obligations of both these contracts cannot subsist together; the contractors are understood by the latter of them to release each other from the obligation of the former. As their joint will or consent produced the obligation of the former contract; so they can by a like joint act destroy this effect, or set the obligation aside. But by entering into the second contract they shew, that it is then their will to bind themselves to what is contained in this second contract; and consequently whatever obligation they might have laid themselves under by the first contract, it must then be their will to set this obligation aside, or to release one another from it. They cannot be supposed to will contrarieties; they cannot therefore intend to produce a second obligation, without intending at the same time to set aside the first, which, if it subsisted, would make the second impossible.

What is here affirmed concerning contracts, that a subsequent contract will make an antecedent one void, may be easily reconciled with what has been affirmed in another <sup>m</sup> place, concerning promises and obligatory acts in general, that any subsequent promise, which is contrary to one, that was formerly made, cannot make the former void. For here we are speaking of what may be done by the joint act of all the parties in a contract; whereas we were there speaking of what one

<sup>m</sup> See B. I. C. XII. § IX.

of the parties in a promise or a contract might do by his own act. An obligation, which is produced by the joint will of two or more persons, cannot be destroyed by the single will of any one of them. If therefore two or more persons have bound themselves to one another by a contract, any other contract, which is made for a contrary purpose between any one of those persons and some one else, who was no party in the former, will be void. The former obligation still subsists, because his single act could not set it aside. And as long as it subsists, he has no moral power of binding himself to any thing, which is inconsistent with it. But if all, who were parties in the former contract, are likewise parties in the subsequent one; their joint act of binding themselves to one another by this subsequent contract will make the former void. Though one of them by his own will cannot release himself; yet their joint consent is sufficient to release one another from the former obligation: and by this subsequent contract, in which they are all parties, they are understood to give such joint consent.

But there may be such an accidental situation of things, or such an unforeseen event may happen, as will render it impossible in some particular case to comply with two laws or two contracts, which in their general tenor are consistent with one another, and may well subsist together. One of these laws will not repeal the other, or one of these contracts will not make the other void in general: because by the supposition they are consistent with one another. But this particular case, which was not foreseen, and therefore was not provided against, must, when it arises, be of necessity excepted out of the obligation of one of the laws or one of the contracts; because they cannot both be complied with. The question here will be, which of the two laws, or of the two contracts, is to give way

to the other? the case must necessarily be excepted out of the obligation of one of them; which of them therefore will most reasonably or most consistently with the intention of the law-maker, or of the contractors, admit of the exception? Where two laws or two contracts are contrary to one another in all respects, we say, that the latter makes the former void: because the law-maker or the contractors could not intend the obligation of the latter without intending at the same time to set the obligation of the former aside. But where they are in general consistent with one another from the beginning, and interfere only in some particular case and by some unforeseen accident; the law-maker or the contractors may well be understood to have intended from the beginning, that both of them should be observed.

In determining which law or which contract is to be observed, where two laws or two contracts accidentally interfere; Grotius says, that the latter, is to be observed in preference to the former. But then he proposes this as a rule, which is only to be applied, when all others fail, or when all other circumstances are equal; so that the point could not be settled without the help of this rule. The other rules, which he lays down for this purpose, are these, which follow.

First; a law, which only permits, must give way to a law, which commands or forbids. For a permission is only a check upon the operation of that law, which grants the permission, and not upon the operation of this other law, which happens to interfere with it.

Secondly, a law, which may be complied with at any time, must give way to a law, which, if it is not complied with now, cannot be complied with at all. When some of our Saviour's disciples were displeased with the woman, who had poured a box of precious ointment on his head, which, as they urged, might



have been sold for much and given to the poor; he defends her upon this principle. Jesus said, let her alone, why trouble ye her? she hath wrought a good work on me: for ye have the poor with you always, and whensoever ye will, ye may do them good; but me ye have not always. The reasonableness of this rule is evident. By holding the conduct, which it recommends, we may satisfy both the laws, one of them now, and the other at some future opportunity, when they do not interfere. Whereas by the contrary conduct we can only satisfy one of them: if at present we act in compliance with that, which might have been complied with at any time, we lose the only opportunity of complying with the other.

Thirdly; Grotius deduces it as a consequence from the rule last mentioned, that a negative law, or a law, which forbids, is commonly to be observed in preference to an affirmative law, or to a law, which commands; when they happen to interfere with one another. A negative law obliges at all times, at the present as well as at any future opportunity: so that if it is not complied with now, no future compliance will satisfy for the present violation of it. But an affirmative law is understood then only to oblige, when there is a convenient opportunity of doing what it commands: and certainly it is not a convenient opportunity, when we cannot do what this law commands without doing what another law forbids. Our author has very rightly limited this rule, by speaking of it as a rule, which commonly holds good. But Puffendorf unadvisedly delivers it in general terms, as if it was universally true, and admitted of no exception, or required no limitation. And yet when one law says, that no woman shall have her statue placed in the gymnasium; and another says, that whoever kills a tyrant shall have a statue in the gymnasi-

um ; he determines, that if a woman had killed a tyrant, her statue should be placed there : notwithstanding this determination makes a negative law give way to an affirmative one. He judges in favour of the woman ; because by following that law, upon which she claims a statue, more benefit may arise to the public, than by following the other. The reason of one of these laws was, that the youth, who were trained up to valour in the gymnasium, by seeing those, who had freed their country from slavery, rewarded with the honour of a statue, might be incited to imitate their bravery. The reason of the other law was, that the virtues of women are not generally the object of their imitation, who are to be trained up to valour. And from hence he concludes, that, since a woman has outdone her sex, she the rather ought to have her statue put up in the gymnasium ; because such valour in a woman would be a greater incitement to emulation in the men. I do not question the justness either of the rule, upon which he proceeds, or of the determination, which he deduces from it. My only reason for mentioning this determination here is, that it shews the rule, which is now before us, not to be so universally true, as he seems to suppose it.

Fourthly ; when two laws interfere, if they are equal in other respects, that, which is more particular, takes place of that, which is more general. The principal reason, which supports this rule, seems to be, that the legislator, where he speaks particularly and exactly, appears to be more careful to guard against all exceptions, which might arise accidentally, and may therefore be thought more unwilling to admit of any, than where he speaks in general and at large.

Fifthly ; a law which is established upon a penalty, is to be observed in preference to a law, which has no penalty annexed ; if they happen to interfere. This is not designed as a rule of prudence directing a person,

when he is in doubt which of the two laws he should obey, to take the safer part and to comply with the penal law, that he may avoid the penalty. For where two laws interfere, the question is, which of the two the legislator would chuse to have him comply with; and when this question is rightly determined, the other law does not oblige him. From whence it follows, that if any reason could be given, why the legislator would chuse to have him obey the other law, rather than the penal one; it would be as prudent to hold this conduct, as the contrary: because upon this supposition, the penal law would not oblige him; and consequently by this conduct, as well as by the contrary, he might avoid the penalty. But the penalty, though it is not to be considered as a prudential reason, why the penal law should be obeyed, rather than the other, is a reason, why we should presume, that the legislator would rather chuse to have this law obeyed: because from his taking care to guard this law more strongly we may conclude, that he thought it of more importance, than the other.

Sixthly; If both the laws are penal, the preference is to be given so that, which is established upon the higher penalty. We cannot well support this rule by the maxim, which is generally applied in doubtful cases, that of two evils the least is to be chosen. In this maxim by an evil must be meant either a moral or a natural evil, that is, either an evil, which we are to do, or an evil which we are to suffer. Now if we understand the maxim in the former sense, which is the true one; it will only amount to this; where we must do wrong either way, it is best to follow that course in which we shall do the least wrong. But in this sense the maxim is so far from supporting the rule here laid down, that, where two laws interfere, and we are in



doubt which is to be obeyed, it will afford us no help at all towards removing the doubt. For when we are in this situation, the very question is, whether we shall do the less evil by disobeying this or by disobeying that law : and consequently to say here, that out of two evils we should chuse the least, cannot help to remove this doubt : because this maxim, since it contains nothing, but what is contained in the question, upon which we doubt, leaves the question just where it was. But if we take the maxim in the other sense, and consider it merely as a maxim of prudence, which directs us, where out of two evils we must suffer one, to follow that course, which will make us suffer the least, it is not applicable to the point, which is now before us : because it supposes, that, whatever course we follow, we must suffer the penalty of one of the laws. Whereas, when two laws interfere, and it is impossible to obey both of them ; if we chuse rightly, that is, if we obey the law, which the legislator would in such a case chuse to have us obey, we shall avoid both the penalties. We comply with one of the laws, and therefore stand clear of the penalty, upon which it is established. And though we disobey the other, we cannot justly be punished for disobeying it ; because whilst we comply with that, it was impossible for us to comply with this. But the rule, which directs us, where two laws interfere, to give the preference to that, which is established upon the higher penalty, though it is not supported by the maxim, that out of two evils the least is to be chosen, may be supported by the same reason with the rule, which was last mentioned. The legislator has guarded that law the most carefully, which he has established upon the higher penalty ; from whence we may presume, that he looked upon that, as the law of the more importance, and consequently that he would chuse

to have us comply with that, if by any accident it becomes impossible for us to comply with both.

Seventhly; where two laws interfere, we should follow that, which is recommended by the most honest or the most beneficial reasons. The question concerning the woman's claim to have her statue in the gymnasium, is determined in her favour by Puffendorf: because the law, which gives her this claim, is recommended by a more beneficial reason, than the other law, which opposes her claim. Another question, which has already been mentioned, where the same law by accident interferes with itself, may be determined by comparing the honesty or justice of the reasons on both sides. Where two women had been ravished by the same man; and the law gave any woman, who had been thus injured, her option, that the man should either be put to death or be compelled to marry her; one of them claimed to have him put to death, and the other claimed to have him in marriage. She, who claims to marry him, would lose her husband, if he was put to death: whereas she, who claims to have him put to death, does not properly lose any thing by his marrying the other. The claim therefore of the former seems to be recommended by a more honest and just reason, than the claim of the latter.

XIII. There are scarce any laws, but what will naturally admit of rational or liberal interpretation, that is, either of being so enlarged, as to take some cases into the meaning of the law, which are not contained in the letter, or of being so restrained as to exclude some cases out of the meaning, which are contained in the letter. For the intention of the legislator is the natural measure of the extent of the law, whether that intention is collected from his words alone by literal interpretation, or from his words and some other signs by mixed interpretation, or from such other signs

Scarce  
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alone by rational interpretation. In like manner wills and contracts naturally admit of being interpreted rationally, of being so enlarged, as to extend beyond the letter, or of being so restrained, as to fall short of it: because the intention of the testator or of the parties contracting, as far as it is known, is the natural measure of the claim arising from these acts; whether that intention appears plainly in their words; or is ascertained by the help of some other signs and of their words taken together, when their words leave it doubtful; or is collected from such other signs alone, when their words do not express it perfectly.

The design of the legislator, in some civil laws, or in some clauses of them, is indeed confined to his words: and where it is so confined, nothing can either be taken into the meaning of the law, or be left out of it by rational interpretation. The design of an explanatory law is to explain by words the meaning of the legislator in some antecedent law, which was expressed ambiguously or imperfectly. An explanatory law therefore will not admit of rational interpretation: as the design of the law is confined to the words of it, we must look for the meaning of it in the words only. For the same reason all definitions in a law are to be interpreted closely: they are neither to be enlarged to any thing more, nor to be restrained to any thing less, than the words express. The legislator designs in such definition to explain by his words the term, which he defines: whatever therefore is more than these words express, is not within the design of the legislator; and whatever is less, falls short of his design.

But either an explanatory law, which has reference to some antecedent law, or a definition in a law, which has reference to some term made use of in the same



law, though they do not admit of rational or free interpretation, may possibly be ambiguous: and when they are, we must ascertain the meaning of the legislator by mixed interpretation. If the ambiguity in these laws arises, as it frequently does in other laws, from a word or a sentence, which will admit either of a more extensive or of a more confined sense; we must have recourse to the topics of mixed interpretation to determine in which of these two senses such word or such sentence was used by the legislator. For though explanatory laws are to be interpreted closely, and will not admit of any meaning, but what is contained and expressed in the words of them; yet no argument can be drawn from the nature of such laws, to prove, that, where the words themselves admit both of a strict and of a large sense, we must necessarily adhere to the former. We must indeed keep to the letter of the law: but there is no natural reason, why we must follow the narrowest and most confined sense, that the letter of the law is capable of.

Rational interpretation, both such as enlarges the meaning of the writer beyond his words, and such as restrains it to a less extent than what his words import, may be expressly precluded by some positive declaration of the writer himself. If the law-maker, or the contractors, or the testator have directed that the law, or the contract, or the will, shall be construed according to the literal and grammatical sense of the words; this direction is a bar to all interpretation, which is purely rational: it shews, that the intention of the writer came fully up to his words, and went no farther; and consequently that whatever meaning we give to the writing, which either falls short of the words or goes beyond them, such meaning is not agreeable to his intention. But though a declaration of this sort

precludes all interpretation, which is purely rational, and obliges us to interpret the writing strictly or rather closely, that is, to adhere, in our interpretation of it, precisely to the words; yet if the words themselves are ambiguous, if in their literal and grammatical construction they will admit of more senses than one, we may notwithstanding such declaration, have recourse to mixed interpretation, and may argue from rational conjectures to determine in which of these several senses the writer used them. For mixed interpretation is not inconsistent with the writer's declaration: because this sort of interpretation, whilst it proceeds upon rational conjectures, keeps to the literal and grammatical sense of the words. Now amongst other causes of ambiguity, one is, that the words of a writing, in the common acceptance of them, are sometimes used in a more narrow and sometimes in a more comprehensive sense. And since either of these senses may be called a literal and grammatical sense; because both of them are equally authorized by common usage; the consequence is, that, though the writer has required us in our interpretation to adhere to the literal and grammatical sense, there is no more reason, upon account of what he has said about this matter, to adhere rather to the narrow or strict sense, than to follow the comprehensive or large sense: notwithstanding his direction about following the literal and grammatical sense, we must make use of probable conjectures drawn from other topics, besides his words, to determine in which of the literal and grammatical senses he used the words, whether in their narrow and strict sense, or in their comprehensive and large sense. Thus a declaration or direction of this sort, though it obliges us to interpret the writing strictly, in one sense of the word — strictly, does not oblige us to interpret it strictly in another sense of the same word: it obliges us

to keep strictly to the words of the writing without deviating from them, either so as to leave any thing out of his meaning, which the words express, or so as to take any thing into his meaning, which they do not express. But it does not oblige us, whilst we keep strictly to the words, to follow the most narrow or the strict sense of those words : it leaves us at liberty to follow either this sense, or the more comprehensive and large sense, according to what we find by rational conjectures to have been most probably his meaning.

If there are any other civil laws, in which we are not allowed to make use of rational interpretation, besides such, as are merely explanatory, that is, if in the interpretation of any other laws, besides these we are not allowed to take either more or less into the meaning of them, than what the words express ; this restraint arises not from the nature of the laws themselves, but from some positive institution. And this positive institution may either be contained in the particular law, which will not admit of rational interpretation, as we have just now observed, that it is, where the legislator directs us to follow the literal and grammatical sense of the words ; or else it may be introduced by a general law, which has been made concerning interpretation by the civil legislator of the society, to which we belong. For the rules of interpretation are under the authority of the civil legislator, and are therefore to be applied in such a manner, and upon such occasions, as he shall prescribe, in view to the general benefit, either by a written law, or by usage and custom ; the former of which is an express act, and the latter is a tacit act of his authority.

In like manner, where any words or sentences in a law or a contract, have two senses in common acceptance, one of which is more confined, and the other



more comprehensive; there is not any particular sort of laws or contracts, which will naturally require such ambiguous words or sentences to be taken in the more confined sense; nor is there on the contrary any particular sort, which will naturally require them to be taken in the more comprehensive sense. The intention of the legislator is the natural measure of the obligation arising from the law; and the intention of the parties contracting is the natural measure of the claim arising from the contract. This intention is to be collected from the same topics of interpretation in laws and contracts of all sorts: unless the civil legislator of the society, in which the law is made, or to which the contractors belong, has expressly prescribed some particular rules of interpretation, or some particular method of applying the rules suggested by natural reason; or unless such particular rules or such particular method of application have been introduced and established by long and uninterrupted usage, which has the same effect, as if the civil legislator had expressly prescribed them.

## C H A P. VIII.

## Of civil subjection, and civil liberty.

- I. *General notion of subjection.* II. *Subjection private and public.* III. *Different degrees and sorts of private subjection.* IV. *Different degrees and sorts of public subjection.* V. *Civil subjection of the parts and of the whole.* VI. *What sort of subjection implied in the notion of a province.* VII. *Civil liberty what.* VIII. *Civil liberty of the parts and of the whole.* IX. *Slaves why incapable of being members of a civil society.* X. *Where subjection ceases right of resistance begins.* XI. *Relation of governour and subject is a limited one.* XII. *Resistance to the supreme power how to be understood.* XIII. *Right of resistance does not imply supreme civil power in the people.* XIV. *Opinion of Grotius explained.* XV. *Civil judge not necessary to fix the point where right of resistance begins.* XVI. *Treason and rebellion how guarded against notwithstanding right of resistance.*

I. **E**VERY compact, in which a man consents to lay himself under an obligation of doing or of avoiding what the law of nature had not otherwise obliged him to do or to avoid, is a diminution of his liberty. Before he had engaged in the compact, or had laid himself under the obligation; he was at liberty either to have done or to have avoided what is contained in the compact. But after he has consented to be thus obliged; he is no longer possessed of the same liberty: he cannot be obliged to do or to avoid what is contained in the compact, and at the same time be at liberty either to do it or to avoid it, as he pleases.

General  
notion of  
subjection.

But every compact, which implies a diminution of liberty, does not imply likewise a state of subjection. The notion of subjection consists in the obligation of one or more persons to act at the discretion, or according to the judgment and will, of others. When therefore the matter of an obligation, which arises from compact, is so precisely settled from the beginning, as to leave nothing to the judgment or will of those, to whom we are obliged; the obligation, though it diminishes our liberty, does not place us in a state of subjection. Such a compact gives them a claim upon us without giving them any authority over us. Their claim is so limited from first to last, by our own act and according to our own discretion and choice, as never to extend beyond such limitation. This claim therefore is all along rather the effect of the power, which we have over ourselves, than the effect of any power, which they have over us. But when the compact is such from the beginning, as gives them a general demand upon us, and leaves the precise matter of the obligation to be in any respect determined by their discretion and choice; as far as it thus gives them a right to judge for us and to prescribe to us, it gives them an authority over us, and places us in a state of subjection to this authority.

Subjection  
private  
and public.

II. Subjection is commonly divided into private and public. By private subjection is meant subjection to the authority of private persons: and by public subjection is meant subjection to the authority of public persons.

A civil society, though it consists of a great number of individuals, is considered as one artificial or collective person: because it is guided by one common understanding, which is its legislative power, and acts with one common force, which is its executive power. This artificial or collective body is called a public person. The subjection therefore, which is due to a civil society, is



public subjection. But the notion of a public person is not confined to the collective body of a civil society. Whether the legislative body of such a society consists of one natural person, as in monarchies, or is an artificial or collective person consisting of many natural ones, as in aristocracies, and in mixed constitutions ; this natural or this collective person has the keeping of the common or public understanding : and in like manner the executive body, whether it is the same with the legislative body or different from it, acts with the common or public force. These bodies therefore, that is, the constitutional governments of a civil society, are called public persons ; and the subjection, which is due to them is public subjection.

<sup>a</sup> Grotius divides subjection, as it is here divided, into private and public. But first he distinguishes between association and subjection : and though he allows, that a right over persons may be derived as well from association, as from subjection ; yet this distinction implies, that, in his opinion, the right, which a society or collective body of men acquires over the persons of the several individuals, who have associated or joined themselves into such a collective body, is different from subjection. <sup>b</sup> He then goes on to divide associations or societies, as he afterwards divides subjection, into private and public. Those he calls private associations, which are formed by a small number of private persons, who have agreed to act together for the purpose of carrying on some private design. Public associations are either such as produce a public person, or such as consist of public persons ; that is, they are either formed by a large body of men, who have united themselves by a compact into a state or civil society ; or else they are formed by a number of states, which have agreed to act together in the prosecution of some common design. An association of the former

<sup>a</sup> L. I. C. V. § XXVI. VIII.

<sup>b</sup> *ibid.* § XVII.

fort produces a public person; and an association of the latter fort consists of public persons.

If the several persons, who have formed themselves into a society, either private or public, have proceeded no farther than to unite themselves by mutual consent into one body, under the obligation of jointly carrying on their common design; it must indeed be allowed, that the several members of such society will be equal to one another, when they are considered separately: such an agreement does not subject any one member to the authority of any other member; and much less does it subject all of them to the authority of any one or of a few. But in the mean time it is plain, that, as far as the matter of the obligation, which the several members lay themselves under, is not precisely limited from the beginning, all associations produce subjection, not indeed a subjection of any one member to any other, but a subjection of any one to the collective body. For, as <sup>c</sup> we have elsewhere observed after our author, whatever measure is agreed upon in relation to the common purpose of the society by a majority of the members, it will be binding upon all and each, not only upon those, who make a part of the majority, but upon those likewise, who disapprove the measure so agreed upon, or even protest against it. Grotius, whilst he distinguishes between the right over persons, which arises from association, and the right over persons, which arises from subjection, seems to allow, that such a subjection, as we have been speaking of, is produced by association: for he observes, <sup>d</sup> that the body of a civil society, in particular, has a fuller right, than any other society whatsoever, of binding its several members to act for the common benefit in such a manner, as the common understanding dictates. And certainly, if each member of a society,

<sup>c</sup> See B. II. C. I. § II.

<sup>d</sup> L. II. C. V. § XXIII.

either private or public, has obliged himself by compact to be guided in pursuing the ends, for which such society is formed, by a judgment and will, which are not his own; this compact produces subjection; notwithstanding our author distinguishes its effect from subjection, and calls it association. Any particular member of a society may happen to concur with the majority; and if he does, he may appear, whilst he acts according to the judgment and will of such majority, to follow his own. But this concurrence, in regard to his obligation, is quite accidental: he would have been as much obliged to guide himself by the judgment and will of the majority, if he had dissented from the measure, which they agree upon, as he is, when he happens to make a part of the majority, and to concur in what they establish.

III. ° Private subjection admits of several different degrees, from a state of absolute or personal slavery to such limited obligations, as can scarce be called subjection. A compact, by which we give any one person or any number of persons a general demand upon us to act for their benefit, or for the benefit of any one else, without fixing any limits at all to the matter of the obligation, produces perfect subjection or slavery. This sort of subjection, though it is sometimes called absolute subjection, is not absolute in the strictest sense of the word, so as to give the master a right to treat the slave in what manner he pleases, or to compel the slave to do any thing that he pleases: for we have already <sup>f</sup> seen, that the law of nature fixes some limitations to slavery, though the slave himself has not fixed any by the compact, which produced his subjection. It is called a state of absolute subjection; because it is as absolute as the law of nature will allow it to be, or as the persons, who place themselves in such a state, can make it.

Different  
degrees  
and sorts  
of private  
subjection.



But all private subjection is not slavery. The compact, which produces it, may render it imperfect by limiting the matter of the obligation: and the subjection will be the less perfect, in proportion as less is left to the judgment and will of those, to whom we are subject. A labourer, who has bound himself to do only one particular sort of work, is in a state of private subjection: his master by the compact, which is between them; has acquired a right to direct him in what relates to this work. But the subjection is imperfect: because his obligation to be directed by the judgment and will of his master is limited, not only by the general law of nature, as in the case of slavery, but likewise by the particular compact, from which it arose.

Private subjection may be divided into different sorts, as well as into different degrees. Where it has only the benefit of the superiour in view; and all the benefit, which the inferiour finds in it, is merely accidental; it is servile subjection. But where such conditions are annexed to it, as have the benefit of the inferiour principally in view either in whole or in part; that is, where the person, who is in subjection, is obliged either in whole or in part to act according to the judgment and will of another, for the same purpose, which he would naturally have pursued, if he had been free to judge and to chuse for himself; this may be called liberal subjection. A child is in subjection to his parents, and a ward to his guardian: but this, though it is private subjection, is not of the servile sort; because the benefit of the child, or of the ward, is the end or purpose, which it has in view. In these two instances indeed the right to direct does not arise from the consent of the person, who is in subjection: in the instance of a child and his parents, it arises out of the law of nature; and in the instance of a ward and his guardian, it arises either out of some

act of a deceased parent, or out of the civil law, which places the child, during his minority, under the authority of his guardian. But where the civil law allows of adoption, and allows a child, before he is old enough to do any other valid act, to consent to adoption; the subjection of the child to the parents, who adopt him, arises from his own consent. In like manner, where the civil law allows an orphan to chuse a guardian, before he is at legal age to do any other valid act, the consent of the orphan places him in a state of subjection to his guardian. In both these cases the subjection is of the private and of the liberal sort. It is private; because it is subjection to a private person: and it is liberal; because it has the benefit of the inferiour to view. In private partnerships, each of the partners in subjection to the collective body, as far as the matter of the partnership extends: but this subjection, as it has the common benefit for its end, in which benefit each has an interest, is liberal subjection.

Grotius considers subjection as imperfect, not only where the obligation, on one side, and the demand, on the other side, are limited to some particular actions, and include a condition in favour of the person, who is in subjection; but likewise where the obligation and the demand, though they are under no limitation in respect of the matter of them, are limited in respect of the time, during which they are to continue. He would probably have been of another opinion, if he had attended here to a principle, from which he argues <sup>§</sup> elsewhere. When he is proving, that civil power may be sovereign, notwithstanding it is temporary; he observes, that the nature of a thing is not changed merely by its duration, and in particular that the nature of any moral power is to be judged of from the effects,

§ L. I. C. III. § XI.

which are produced by it, whilst it lasts, and not from the time, during which it lasts. Indeed the power of a master over his slave is not civil power; and the subjection of the slave is not civil subjection. But the principle, from which Grotius argues, is general: and if it is true, when applied to power and subjection of one sort; it will be equally true, when applied to power and subjection of any other sort. Now the effects of the masters power are the same, if the matter of the compact is the same; whether that power continues only for a determinate time, or for the whole life of the slave. If therefore the master has a power to direct all the actions of the slave without any limitation, except what arises from the general law of nature; the slave is as much in a state of absolute subjection, where this power continues only for a determinate time, for seven or for fourteen years, as where it continues during the life of the slave. The condition of a temporary slave, if we only consider what it is, whilst the slavery lasts, is neither better nor worse, than the condition of a perpetual slave. Perhaps the prospect, which the former has of recovering his liberty at a certain time, may make his present condition set easier upon him, than the present condition of the latter does, who has no such prospect before him. But the prospect of coming into a better condition, however it may encourage him to bear his present condition well, makes no essential difference in the nature of the condition itself. Though he may be cheered by the hopes of recovering his liberty hereafter; yet he is now, whilst his slavery lasts, as much in a state of perfect subjection, as the other is. It must however be allowed, that, if we were to give our opinion, upon the different conditions of the temporary and the perpetual slave, we should be apt to say, and should have some reason for saying, that



the former is in a better condition than the latter. But the reader, I suppose, is aware, that, when we make this judgment about the difference of their respective conditions, we consider something more, than merely their present conditions; we take the whole of their respective lives, their future as well as their present circumstances, into the account, and reckon the condition of the one to be better than the condition of the other, not because it is better just now, but because it is better upon the whole.

IV. All public subjection is not civil subjection: for in public, as well as in private subjection there are different degrees and different sorts: and civil subjection is one particular sort and degree of public subjection.

Different  
degrees  
and sorts  
of public  
subjection

Not only an individual or private person, but a nation likewise or state, which is a public person, may have slaves. Those, who are condemned to labour for the public in the mines, or in the galleys, or in any other work whatsoever, which the state thinks proper to employ them about, are in public subjection. But as the benefit of the superior is the only end, which this subjection has in view, it is of the servile sort; and as the matter of the obligation is not limited, it is absolute in degree. The supposition, that they, who are thus in subjection to the public, are condemned to slavery, implies indeed, that their subjection does not arise from their own consent; but that it is the punishment of some crime, which they have committed: the instance therefore may seem not to belong to such subjection, as we are now speaking of, which is subjection arising from consent. However, as it is possible for a man thus to subject himself to an individual or private person by his own consent, so it is possible for him in like manner to subject himself by a like consent to a body politic or public person.

Labourers, who let themselves out to the public to do some particular sort of work, such as mending roads, or making fortifications, or building ships, and likewise mercenary soldiers, are in a state of public subjection. Their subjection is imperfect in degree; because the matter of the obligation on their side, and of the claim on the side of the public, is limited: but in the mean time, as the end of it is rather the benefit of the public, than of themselves, it is of the servile sort. But it may be worth the while to observe, that, even in these instances, the subjection is looked upon to be less servile, or approaches nearer to liberal subjection, in proportion as the persons, who are in subjection, have a greater benefit from it. Thus the officers, the architects, and the master-builders are in subjection to the public, as well as the common soldiers, and the under-workmen: but the subjection of the former is more liberal, and of the latter more servile; only because the obligation, in which their respective subjection consists, has the benefit of the former more in view, and the benefit of the latter less in view.

Civil subjection is such public subjection arising from consent, as is limited in the matter of it to those actions or things, which relate to the general welfare or security of the whole civil society or of its several parts. The individuals, who have consented to make themselves members of a civil society, are in consequence of this consent in a state of subjection: because they are obliged by it to act according to a judgment and will, which are not in their own keeping, but in the keeping of the public. This subjection however is neither absolute nor servile. For since the matter of the obligation is limited to what relates to the general welfare and security of the whole society or of its several parts; this limitation makes the subjection imperfect. And since the members of the society have a common interest in the good of the whole

body, and a particular interest in the protection which they have a right to, as they are parts of the whole; this end or view of the obligation makes the subjection liberal.

V. It is very difficult to affix a precise sense to the words—civil subjection, and civil liberty. For whatever sense we may endeavour to affix to them; any man, who chuses to call it into question, may produce numberless instances, both from what he has heard and from what he has read upon these points, to prove, that the words are not always used in this sense: not because there is no sort of subjection, and no sort of liberty, which may properly be called by these names; nor yet because the definitions, which we may endeavour to give of these words, do not fully express the nature of this sort of subjection, or this sort of liberty; but because the words are frequently used as words of course, both in common conversation and in many political writings; so that numberless instances are to be found, in which some person or other has used the words, in speaking or in writing, without any determinate meaning or perhaps without any meaning at all.

Civil sub-  
jection of  
the parts  
and of the  
whole.

Indeed the most accurate writers do not always use these words in one and the same sense. Thus, civil subjection means sometimes the subjection of the whole society, and sometimes the subjection of its several parts; that is, both the subjection of the collective body to its constitutional governours, and the subjection likewise of the several members, either to such constitutional governours or to the collective body, are usually called civil subjection. And if we would avoid being misled or perplexed, in what we read or hear upon these points; it will be necessary for us to distinguish these two senses of the same words from one another, and to observe in which of them the words are used.



The several members of a civil society are in a state of civil subjection; whatever form of government is established in the society. They are obliged by the social compact to follow the dictates of the public understanding in what relates to the general good; whether the constitution is popular, or aristocratical, or monarchical, or mixed. The seat of the civil power indeed is different, in these different forms of government: so that the subjection of the individuals is more immediately due to a different sort of public person. But wherever this power resides, the subjection, which is due to it from the individuals, is only civil subjection. For this is all, that was due by the social compact to the collective body: and this collective body, in settling the constitution by a fundamental law, cannot give either to a king, or to a senate of nobles, or to any other civil governors whatsoever, a more extensive claim upon the several members, than such body originally acquired by their particular consent, either express or tacit, when they united themselves to it.

But though under all forms of government, the individuals, who have made themselves members of a civil society, are of right, whatever they may be in fact, in a like state of civil subjection; yet in democracies the collective body itself is not under any subjection: it governs itself freely, and is not bound by the act of any one or more persons. Whereas in other forms of government, if they have no mixture of a democracy in their constitution, there is a subjection of the whole, as well as of the parts, a subjection of the collective body, as well as of its separate members. For the act of the constitutional governors is not only binding upon the several individuals, who compose the collective body, but in consequence of the general consent, by which the constitution was established, it becomes binding upon this body itself.

From hence we may understand what sort of freedom it is, which puts the difference between free states and other states. The individuals in a free state are not free from civil subjection, any more than they are in any other state, which is governed by a king, or by a select body of nobles. But in a free state the collective body of the whole society is free, or is not under any subjection : whereas in absolute monarchies, or in absolute aristocracies, the collective body is in a state of subjection to its constitutional governours ; because as far as the power of these governours extends, their act is binding upon the collective body, as well upon the several members. Whether common usage has given the title of free states, or not those nations, in which the form of government is a mixed one ; such nations have certainly the essence of a free state ; notwithstanding a king may be vested with the executive power ; provided the collective body is not bound by any act of legislation, in which it does not immediately and directly concur, either by itself or by its representatives. The freedom of the collective body of a civil society is not necessarily connected with a mixed constitution ; it is the particular nature of the mixture, upon which that freedom depends. If the legislative body consists of a single person and of a select number of hereditary nobility ; though the constitution will be a mixed one, yet the collective body of the civil society will be in subjection ; because in establishing the constitution this collective body obliged itself, as far as the ends or purposes of social union extend, to follow a judgment and will, which is not in its own keeping, but in the keeping of that particular part, which composes the legislative body. By adding to these two parts of such a mixed legislative a third, which consists of representatives chosen from time to time by the general body of the society, this general

body, which is usually called the people, does not indeed reserve to itself a full power of legislation ; but it reserves such an independant power, as prevents its subjection : though it has not a power of making laws by its own judgment and will, yet without its own judgment and will signified by its representatives, no laws will be binding upon it.

A like independence, in such a form of government we have been describing, is given to the single person or king, whom we have supposed to be a constitutional part of the legislative body : for though, by the supposition of his being only a part of such body, he has not in matters of legislation a power of binding either the general body of the society, or the particular members of it, by his own judgment and will, without the concurrence of the other parts of the legislative ; yet neither he himself, nor any one else within the society, can be bound by any law, to which he does not consent, at the time of making it ; except the fundamental laws of the constitution, to which he consented either expressly, when he accepted the crown, or tacitly by the act of accepting it. But when we say, that his consent is necessary to make a law binding either upon himself or upon any one else within the society ; we must be understood to include the consent of his predecessors, under the notion of his consent. For as they acted by the same power, which he is possessed of, the effect of their consent, in respect both of himself and of the subjects, is the same, as if such consent had been his own immediate act. If besides this civil independence, which is given to one single person within a society by making him a constitutional and distinct part of the legislative body, we suppose the same person to be likewise invested with the supreme executive power ; he may then very properly be considered as the supreme or sovereign head



of the state. In this latter character only, as he is invested with the supreme executive power, all the members of the society would be accountable to him, or to standing judges, who act for him, in matters of public wrong; and they must have recourse to him, or to the like judges, for redress in matters of private wrong. But if he was invested with no other power, besides this; though he would be the supreme magistrate, he could not well be called the supreme head of the state: he would be supreme in reference to other magistrates, who hold an inferior executive power derived out of his; but as the executive power, even in its highest degree, is subordinate to the legislative power; so he, if he was invested with no other power besides what is merely executive, would be subordinate to the legislative body. But by making him a constitutional and distinct part of the legislative, this subordination is so far taken off, and his executive power becomes so far independent or sovereign, that though he cannot exercise this power in all instances according to his own judgment and will, yet as his consent is necessary in making the laws, which direct the exercise of it, he is not obliged to exercise it according to the judgment and will of any other persons without the concurrence of his own.

VI. Where the general body of a society is in subjection; it is a material difference, whether its civil governors have a claim to this subjection, as they are the ruling parts of this particular body, or whether they have the like claim, as they are the ruling parts of some other society. In the former case the society, notwithstanding its subjection, continues to be a state; but in the latter case, it is a province of that other society or state, the ruling parts of which have a claim to its subjection.

What sort of subjection implied in the notion of a province.

The supposition, that a province is in subjection to the ruling parts of a state, implies, that the state itself is in subjection. But we have here proceeded upon this supposition, only for the sake of shewing, that, though the subjection is in all other respects of the same sort, the difference of external and internal subjection will make one society a province and another a state. For it is by no means essential to the notion of a province, that the state, of which it is a province, should be in subjection to any particular ruling parts. A society may be a province to a free state, as well as to a state, which is not free. Though a free state is not in subjection to any particular ruling parts; yet if the general or collective body of some other society is in subjection to the general or collective body of such free state, this other society will be a province.

Civil liberty  
what.

VII. By natural liberty is sometimes meant the independent physical power, which individuals have of judging, chusing, and acting for themselves. But when natural liberty is distinguished from civil liberty; the former means the moral liberty of mankind in a state of nature, and the latter means their moral liberty in a state of civil society. Now the moral liberty of mankind in a state of nature consists in a power of acting in what manner they think fit, as far as they are under no restraints from the law of nature, when they are considered as separate and independent individuals. and their civil liberty, is sometimes defined to be the like power of acting in what manner they think fit; as far as they are under no restraints from civil laws. This definition of civil liberty is so contrived as to make it answer very well in the words of it to the definition of natural liberty. But it is certainly liable to many objections, and does not fix the true point of difference between the two sorts of liberty.

All laws, which are made by a civil legislator, are civil laws. Now in perfectly monarchical constitutions

the monarch is the civil legislator. His laws therefore, whatever may happen to be the matter of them, whether they tend to the general benefit of the society, or to his own particular interest, may be called civil laws. From hence it will follow, if civil liberty is as much liberty as is consistent with civil laws, that the subjects under all the oppression, which the laws of a despotic monarch can bring upon them, will be in possession of their civil liberties, not only in right but in fact. I am aware however, that this objection may be obviated by looking back into the nature of the social compact: for as this compact limits civil power or the power of a civil governour, so it limits likewise the matter of the laws, which he has authority to make, to such things, as are necessary or conducive to the security and welfare of the whole society or of its several parts. No command therefore of the monarch, though he is the civil legislator, can properly be considered as a civil law, if it is inconsistent with the ends of social union and civil government. So that, notwithstanding civil liberty should be defined to be as much liberty as is consistent with civil laws, the subjects, who are oppressed by the unfocial commands of an absolute monarch, could not be in possession of their civil liberty: because they are under the restraint of such commands, as are not civil laws. Without examining this answer, we will suppose it sufficient so far to obviate the objection, as to shew, that the definition, when it is rightly explained and duly qualified, is a true one. But still this answer will not so far remove the objection, as to shew, that the definition is a good one: for no definition can be a good one, which wants to be explained and qualified, before it will convey a precise notion of the term defined.

But we may object farther, that, if civil liberty consists in as much liberty, as is consistent with civil laws,



or in the power of mankind to act in what manner they please, where civil law does not restrain them, there can be no such thing as civil liberty in any society whatsoever. For the liberty of individuals is <sup>h</sup>restrained in many instances, particularly in such rights as arise out of an injury, by the mere act of civil union without the aid of any civil law, and antecedently to the positive or express institution of any. In all societies therefore, whatever the form of government or the tenor of the civil laws may happen to be, the members are under some restraints, which do not come from civil laws.

Perhaps by considering a consequence, which will follow from this definition, we may be led to the true point of difference between natural and civil liberty. If civil liberty is as much liberty, as is consistent with the restraints of civil laws; the consequence will be, that every new law, however beneficial it may be either to the whole body politic or to the several members, will be a diminution of civil liberty: because it produces a farther restraint, which the subjects were not under before the law was made. But as the private and servile subjection of a slave does not consist in his being restrained by the commands, which his master has actually given him; so neither is there any reason to suppose, that the public and liberal subjection of a member of civil society consists in the restraints, under which he is actually laid by the civil laws. A slave is in subjection, because he is liable to be restrained, not only by such commands, as he has actually received from his master, but by such likewise, as he may receive from him hereafter. And in like manner a member of any civil society is in subjection, because he is liable to be restrained, not only by such laws, as the civil legislator has established already, but by such like-

<sup>h</sup> See B. II. C. V.

wife, as he may establish, when some future occasion makes it necessary. The subjection of a slave is different indeed, both in sort and in degree, from the subjection of a member of civil society. They differ in sort; because one of them is private and servile, and the other is public and liberal: and they differ in degree; because one extends to all a man's actions, and the other is limited to those actions only, which relate to the general security and welfare of the whole body politic or of its several parts. But however these two instances of subjection may differ in other respects, in this they agree, that both of them are subjection: the member of a civil society, as well as the slave, is under an obligation of acting according to a judgment and will, which are not in his own keeping. As far as this obligation extends, that is, as far as their respective subjection extends, neither of them is possessed of his natural liberty. The natural liberty of the slave is destroyed by his being obliged to follow the judgment and will of his master in all things: and the natural liberty of the member of a civil society is abridged by his being obliged to follow the judgment and will of the public in such things, as relate to the common or general good. Thus we see at last, that this obligation of a member of civil society, which is nothing else but the obligation of the social compact, is what puts the difference between natural and civil liberty. If therefore we define natural liberty to be as much liberty as is consistent with the obligation of the law of nature, we should define civil liberty to be as much liberty as is consistent with the obligation of the social compact.

VIII. In order to understand the several senses, in which civil liberty is spoken of, we must distinguish it as we before distinguished civil subjection, into the civil liberty of the parts, and the civil liberty of the

Civil liberty of the parts and of the whole.

whole ; that is, into the liberty of the several individuals, who have united together and compose the collective body of the society, and the liberty of this collective body itself. The civil liberty of the several members of a society implies a freedom from all, except civil, subjection : but the civil liberty of the whole body implies a freedom from all subjection whatsoever. After a number of individuals have united together and formed a civil society ; though any one of them is equal to any other, when they are considered separately ; yet each by the social compact is made subject to the joint authority of the whole or collective body. But in the mean time this whole or collective body is under no restraint, either from within or from without, except the restraints of the law of nature ; the social compact does not give any particular part of such body a right or authority to direct or to bind the whole : and much less does it give such right or authority to any other society of the same sort, or to the ruling part of any other.

When the society has proceeded farther, than the mere act of social union, and has established some other form of government, which is different from such a perfect democracy, as would result from this act alone ; it will depend upon the nature of that form of government, which is so established, whether the civil liberty of the whole shall remain or not. An absolute monarchy puts an end to this kind of civil liberty. For where a single person in the collective body has a constitutional right of directing the whole, this collective body is in a state of subjection : because it is bound to act for the purposes of social union by a judgment and will, which are not in its own keeping. This indeed is, of right, only civil subjection. But though civil subjection is consistent with the civil liberty of the parts or several members ; it is not consistent with the civil liberty of the



whole or collective body. For civil liberty is as much liberty as is consistent with the obligation of the social compact: and this compact, whilst it placed the separate members of the society under civil subjection, left the joint or collective body free to judge and to chuse for itself. An absolute aristocracy is likewise inconsistent with the civil liberty of the whole: because, though such a constitution puts the power of governing the society into the hands of more persons than one, yet it places the whole body in a state of subjection to a small number of men, who are only a particular part of that whole. A mixture of these two forms of government, in whatsoever manner the mixture is made, will be as inconsistent with the civil liberty of the whole, as either of them alone would have been: for under such a mixed government the collective body of the society will be in a state of subjection; that is, it will be under an obligation of acting according to a judgment and will, which are not in its own keeping, but in the keeping of a part. But in popular forms of government, and in such mixed forms likewise, as are in part popular, the civil liberty of the whole remains: because the collective body is not bound to follow the dictates of any judgment or will, in which it does not concur either by itself or by its representatives.

In any of the other forms of government, as well as in the popular forms, the civil liberty of the parts or several members of the society remains of right. The subjection, which they owe to their constitutional governors, whether the government is in the hands of a king, or of a senate of hereditary nobility, is only civil subjection. No constitutional civil governors, whatever their titles or denominations may be, have any other right or moral power of restraining the several members, than the collective body of the whole society has in a

perfect democracy: and this right is no other, than what is derived from social union, a right to direct them what they are to do and what they are to avoid for the general good, and to enforce these directions, where it is necessary, by the use of the joint strength.

You may therefore ask perhaps, of what importance it is to individuals what form of government they live under; if an absolute monarchy, or an absolute aristocracy, whilst they take away the civil liberty of the whole collective body, leave the several members the same right to their civil liberty, that they would have had under a popular constitution? The answer to this question is obvious. There is a wide difference between the right of the individuals to their civil liberty, and their enjoyment of this liberty in fact. Under every form of government their civil liberty is the same in right; but there is not the same security under every form, that it will be so in fact. Though the members of a civil society are not slaves in right to an absolute monarch, who has all civil power in his hands, both legislative and executive; yet he is in such a situation, as gives him an opportunity, and arms him with strength enough, to treat him in fact, as if they were his slaves. It is possible that a sovereign prince, who has as absolute authority, as the nature of civil power will admit of, may make the general good of his people the measure of his conduct. But it is possible likewise, that he may hold the opposite conduct, and instead of regarding their interest, may compel them, as if they were his slaves, to advance a separate interest of his own; whether he places this separate interest in gratifying his ambition, or his avarice, or his vanity, or his love of pleasure. The several members of the society, when they are in such a situation, do not enjoy their civil liberty: but the nature of

the constitution does not take it from them of right ; the injustice of him, who administers the constitution, takes it from them in fact. Since therefore in the nature of the thing there is a possibility, and since from the general temper of mankind, there is some likelihood, that where all is left to the will of one man, the trust, which is reposed in him, will be abused ; it is necessary in order to secure the civil liberty of the several members in fact, to preserve and maintain the civil liberty of the collective body, by giving it so much weight and influence in the legislative, that nothing can be done there without its consent, or without the consent of its representatives.

We may now understand what is meant, when, upon a change of the civil constitution of government in any nation from popular or mixed, to aristocratical or monarchical, we say, that the nation has lost, or has given up its civil liberty. What is thus more immediately lost or given up of right is the civil liberty of the collective body, and not the civil liberty of the individuals. This body, whilst the form of government was popular, acted for itself, according to its own judgment and will : but upon such a change in the constitution, it is brought into civil subjection, and obliges itself, in pursuing the ends of a civil society, to act according to a judgment and will, which are in the keeping of the governing part ; of one single person if the new form of government is monarchical, or of a body consisting of a few hereditary nobility, if it is aristocratical. But whatever the collective body of the society gives up in this change of the constitution, the several members of it, when they are considered separately, have the same right to their civil liberty, that they had before. Whilst the popular form of government continued, each was obliged to pursue the ends of social union according to a judgment and will,



which were not in his own keeping; and each is obliged to no more than this under the new form; the only difference in right is, that in the popular form this judgment and will were in the keeping of the collective body or of its agents and representatives; whereas in the monarchical or aristocratical form, they are in the keeping of the particular ruling part of that body. But though this, in respect of the separate members, is the only difference in right, there will most probably be another difference in fact; the civil liberty of the whole or collective body is the support and security of the civil liberty of the several parts or members. The loss therefore of the former in right will commonly be attended with the loss of the other in fact.

Perhaps it may here be asked, how the several parts or members of a society, when they are considered separately, can possibly have a right to their civil liberty, where such a form of government has been established by consent, as is inconsistent with the civil liberty of the whole or collective body? because this collective body consists of all the members taken together; and it is not easy to conceive, that the several parts should retain a right to civil liberty, when the whole has lost it. This would indeed be impossible, if the same thing was meant by civil liberty, when we speak of the whole or collective body, and when we speak of the several parts or members of that body. But the civil liberty of the whole consists in a freedom from all subjection whatsoever: whereas the civil liberty of the parts consists in a freedom from all, except civil, subjection. The collective body therefore, when it is placed in a state even of civil subjection, is said to have lost its civil liberty. Now this is all the subjection which such body owes in right to its civil governours. The subjection therefore of the whole, that is, the loss of the civil liberty of the whole, implies nothing more than the

civil subjection of the several parts. But as long as the parts or, several members, are only in a state of civil subjection, they have a right to their civil liberty ; that is, they have a right to be free from all restraints, except those, which, being necessary or conducive to the general good, arise out of the social compact, or are derived from it.

In mixed forms of government, where the agents or representatives of the people make a distinct and constitutional part of the legislative body; it is commonly said that the civil liberty of the people consists in their right of thus acting in the legislative by their representatives. But before we can judge either of the truth or of the propriety of what is thus said ; it will be necessary to consider, what is here meant by the people : for the word — people — may either mean the collective body consisting of all the members taken together, or it may mean the several members taken individually.

Now the precise notion of civil liberty, when we speak of the whole people considered as one collective body, consists in the freedom of this body from all subjection whatsoever, or in its right of not being obliged by any judgement and will, with which its own judgement and will do not concur. But this freedom of the collective body from all subjection implies, that it has a right of acting as a distinct and constitutional part of the legislative, or that nothing can be done by the legislative without its concurrence. For since the act of the legislative is binding upon the whole society ; if the legislative could do any act without the concurrence of the general body of the people, this body would be in a state of subjection, From hence it appears, that, when we speak of the people as one general or collective body, we may very properly say, that the civil liberty of the people consists in the right of acting as a distinct part

of the legislative : because the collective body, if it had not this right would be in a state of civil subjection ; and a state even of civil subjection is inconsistent with the civil liberty of such body.

But though the civil liberty of the collective body of the people necessarily implies a right of acting in the legislative, yet the particular manner of acting there by representatives is not essential to the general notion of civil liberty. The people considered as one collective body will not be obliged to follow any judgment and will, with which its own does not concur, whether it acts there by its individual parts, or by its representatives ; that is, whether the concurrence of the several members taken individually, or of the majority of them is necessary in making laws ; or whether the concurrence of representatives, who are chosen and appointed from time to time by the collective body for this purpose, is sufficient. The constitution or established form of government in each nation, where the body of the people is possessed of its civil liberty, determines in which of these ways this body shall act in the legislative, whether it shall act by its several members, so that all the individuals shall have a right of voting in the legislative, or whether it shall act by its representatives, so that the right of voting there shall be confined to these representatives. If therefore by the constitution of any particular nation the collective body of the people has only a right of acting in the legislative by its representatives : the constitutional liberty of the people may in that nation be said to consist in this right. For as the civil liberty of the collective body of the people in any nation implies, according to the general notion of it, a right of acting in the legislative in some manner or other ; so in that particular nation the constitution has settled the manner, and has determined this right of the



collective body to be a right of acting there by its representatives. Thus we find, that the civil liberty of the people, when considered as one collective body, may properly enough be said to consist in their right of acting in the legislative ; because such a right is necessarily implied in the freedom of this collective body from subjection : and we find likewise, that their constitutional civil liberty, when they are thus considered as one collective body, may be properly said to consist in their right of acting in the legislative by representatives in those nations, where the constitution requires them to act in this particular manner, and does not allow them to act individually.

But if by the people we mean the several individuals ; we cannot with any propriety say, that their civil liberty consists in their right of acting individually in the legislative, and much less that it consists in their right of acting there by their representatives. In a perfect democracy, if such a form of government was established in any civil society, each member of the society would have a right of acting individually in the legislative : no laws indeed would be established, or nothing would be done, upon the single authority of any one member : but the opinion or vote of any one would have as much weight and influence, as the opinion and vote of any other. The civil equality of the several members consists in the right, which any one of them has of thus acting in the legislative with as much weight and influence, as any other of them. But we cannot suppose the civil liberty of each to consist in the same right, without supposing some of the members in every civil society, even where a democracy is established, to have no civil liberty ; unless the democracy is a perfect one. In all other democracies, only some of the members have a right of acting individually in the legislative, and

many others of them are excluded from acting there at all. Either therefore in imperfect democracies, where the members of the society, who act in the legislative, act individually, those, who are excluded from acting there, upon account of some defect in their age, their sex, or their fortune, have no civil liberty; or else in perfect democracies the civil liberty of the several individuals does not consist in their civil equality, that is, in the right, which each of them has, of acting individually with an equal weight and influence in the legislative. The common mistake is, that we suppose the civil liberty of the individuals, like the civil liberty of the collective body to mean a freedom from all subjection whatsoever. And since in a perfect democracy, where each member acts individually with an equal weight and influence in the legislative, no one member and no select number of members has any authority over the rest; we are apt to consider each as exempted from all subjection, and to place the essence of the civil liberty of individuals in such a civil equality. This principle, as we have seen already will lead us to conclude, that many members of every civil society, even under a democratical form of government, can have no civil liberty; because even in democracies, unless they are perfect ones, many of the members are so far from acting with as much weight and influence in the legislative, as the rest, that they are excluded from acting there at all. But the civil liberty of the several members of a society does not consist, as the civil liberty of the collective body does, in a freedom from all subjection whatsoever; it consists only in a freedom from all, except civil, subjection. Unless therefore the members of a civil society by ceasing to have a right of acting individually in the legislative are in a state of any other, besides civil, subjection; they

have not lost their civil liberty, by ceasing to have this right: and consequently the essence of their civil liberty cannot consist in this right.

We may shew in like manner, that, in those democracies, or in those mixed constitutions, where the collective body of the people acts in the legislative by representatives, though the civil liberty of such collective body may be said to consist in this right, yet the civil liberty of the individuals cannot be said to consist in it. There is in fact no democracy and no mixed constitution any where established, which allows every individual a right of voting in the choice of such representatives. Many are excluded from this right, not only upon account of their sex, or of their legal minority, but upon account likewise of the smallness of their property, or even upon account of the sort of property, which they are possessed of, though it should in itself be ever so large. Shall we say therefore, that those, who are thus excluded from voting in the the choice of representatives, have no civil liberty, and that those only have civil liberty, who have a right of voting? This I suppose, will scarce be said: and if it is not said, the consequence is obvious. If those individuals, who have no right of voting in the choice of the representatives of the people, either in a democracy or in a mixed form of government, have their civil liberty; the consequence is, that their civil liberty cannot consist in a right of acting by representatives in the legislative: for the agents or representatives of the people cannot naturally be considered as the agents or representatives of those individuals, who have no right of voting in the choice of them.

It is indeed very intelligible, that, when the laws of a society have limited the right of voting, in the choice



of the agents or representatives of the people, to those persons, who have such qualifications, as these laws describe, the agents or representatives so chosen will have the same power of binding the several individuals, even those amongst the rest, who had no vote in the choice of them, that the collective body, or the majority of such collective body, in a perfect democracy, has of binding its several members, even those amongst the rest, who do not concur with such majority. But in the mean time, they are not properly the representatives of any individuals in particular, but of the collective body in general : and especially they are not the agents or representatives of those individuals, who had no vote in the choice or appointment of them.

But though the civil liberty of individuals in any nation, where the collective body of the people acts in the legislative by representatives, does not consist in their right of thus acting ; yet the right of the collective body thus to act, is of great importance to the civil liberty of the individuals : the essence of the civil liberty of individuals does not consist in this right ; but this right is the support of their civil liberty. For the freedom of the collective body of the people, from all subjection whatsoever, is what maintains and supports the several individuals in their freedom from all, except civil, subjection.

Slaves  
why inca-  
pable of  
being  
members  
of a civil  
society.

IX. It is essential to a civil society, that the several members of it should be persons of <sup>i</sup> free condition ; so that no person, who is not of free condition, is capable of being a member of such a society. But the freedom here required is not a freedom from all subjection, but only from absolute and servile subjection, that is, from slavery. A freedom from all subjection whatsoever is so far from being necessary to qualify any person to be a member of a civil society ; that the civil subjection, which each member is under, either to the society in

<sup>i</sup> See B. I. C. I. § XI.

general, or to the ruling parts of it in particular, is the very reason, why a slave is incapable of being a member. A slave is obliged to act for his master's benefit in all things, according to the judgment and will of his master. He is therefore incapable of becoming a member of a civil society: because, whilst he is under this unlimited obligation to a private person, he is incapable, or has not the liberty, of obliging himself, as every member of a civil society is obliged, to act for the general security and welfare of such society, according to the judgment and will of the public. If we were to suppose the several members of a civil society to be under no subjection to the civil government of it, that is to be under no obligation of maintaining the general security, and of advancing the general interest of it, under the conduct of the public understanding; a slave would be as capable, as any one else, of being a member of such a society.

Since slaves are not, and cannot be, members of a civil society; their situation is something singular, when they live within its territories, and their master is a member of it. As they have no will of their own, they cannot, by any express or tacit act, subject themselves to the laws of the society, either perpetually, as those persons do, who become members of it, or for a time, as aliens do, who reside within its territories. And since they cannot subject themselves to the laws, for the benefit and security of others; they are therefore incapable of acquiring a right to the protection of the laws for their own benefit and security. But by means of their master they are brought under the authority of the laws. They are considered as parts of their master; and are therefore subject to the laws, because he is subject to them. Or to speak more plainly, the society would not suffer him to bring any person,

and much less to bring any considerable number of persons, to live within its territories, unless he would agree to make them accountable to the laws, or to be accountable for them himself, at least as far as the general security requires : and his agreement for this purpose binds them because their will is concluded by his. Upon his account likewise, or by his means, they are placed under the protection of the society : for as he has a just right to be protected by the society ; so he has a right, that his slaves, who are parts of him, should likewise be protected by it ; that is, as far as he has an interest in their labour, they may be considered as his property, and will therefore be under the protection of the society, in the same manner with any other parts of his property.

The principal question concerning the protection of slaves is, whether the society has authority to protect them against their master ? <sup>k</sup> We have seen, that the power of the master is under some limitations, which necessarily arise out of the law of nature ; and consequently by any such treatment of them, as exceeds these limitations, he does them an injury. The question then is, whether the society, of which he is a member, has authority to protect them against such injuries, or to punish him for having been guilty of them ? The mere act of social union does not seem to give the society such an authority over the master for the benefit or security of his slaves. The society, in consequence of the master's act, by which he became a member of it, takes the slaves under his protection as a part of his property : but the authority thus acquired is an authority to protect them for his benefit, and does not include an authority to protect them against him for their benefit. Civil laws however may do what the mere act of civil union had not done : if it appears to the common understanding, that the master's liberty of

<sup>k</sup> See B. I. C. XX. § V.



treating his slaves otherwise, than the law of nature allows, will tend to make him a worse member of society, more imperious towards his inferiours, more assuming towards his equals, more insolent towards his superiours, and more cruel towards all ; the civil legislator has a right to restrain him from these excesses, and to punish him, if he is guilty of them.

X. It is a question of some importance, and has been thought a question not easily to be determined ; whether the members of a civil society have, upon any event or in any circumstances whatsoever, a right to resist the governours, or rather the persons, who are invested with the civil power of that society.

Right of  
resistance  
begins  
where ci-  
vil subjec-  
tion  
ceases.

Without stopping here to enquire, whether some, if not most of the difficulties, that we meet with in this question, have not arisen from the common manner of stating it ; we will first consider the question itself, as it is here proposed, and then endeavour to clear up some of the principal difficulties relating to it, as well those, which have arisen from the manner of stating it, as those, which have arisen from some other cause.

The subjection, which is due from the members of a civil society, that is, from the people, to those persons, who are invested with the civil power of that society or are appointed to govern it, may cease several ways. First, their subjection ceases, when the governours of the society abdicate or relinquish their power. Those persons, who were the governours of the society, cease to be the governours of it by abdication : whatever power or authority they might have before, they cease to have the same power or authority, after they have relinquished it. And if there is no power or authority on one side ; no subjection is due on the other side.

Secondly ; civil power or authority in its highest degree is limited by the laws of nature and of God : it

does not give those, who are invested with it, a right of commanding what is inconsistent with these laws, or of compelling obedience to such commands. In respect therefore of what is inconsistent with these laws, civil subjection ceases. For where the civil governours have no right to command or to compel, the people are under no obligation to obey or to submit. A distinction indeed is sometimes made here between an active and a passive obedience, between an actual compliance of the people with any commands of the civil governours, which are contrary to the laws of nature and of God, and a passive submission to what these governours think fit to inflict upon them for not complying. But this distinction cannot be so applied, as to shew, that where the people are not obliged actively to obey the command, they are obliged passively to submit to the evil, which is brought upon them for not obeying it. You may say, that the law of nature and of God, though it does not leave the people at liberty to do what it has forbidden, leaves them at liberty to suffer patiently what the civil governour thinks proper to make them suffer. But if this is all, that you have to urge in support of the duty of passive obedience, where there is no obligation to an active one; this duty rests upon a very weak foundation. Though the people are at liberty to submit patiently, if they will; it will be no consequence, that they are obliged thus to submit: though no law of nature or of God has forbidden passive obedience; unless perhaps the law of self-preservation, upon which however I shall not insist; yet you cannot conclude from hence, that such obedience is a duty: to support this conclusion you must produce some law of nature or of God, which enjoins it. In the mean time it seems to be self-evident, that, where the civil governours of a society have no right

or authority to command, they have no right or authority to make use of force either to compel obedience or to punish disobedience. But it is a known principle of natural law, that, where there is no right on one part, there is no obligation on the other part. The people therefore are not in subjection to any force, which is made use of by the civil governours for these purposes, or are not obliged passively to submit to such force.

Thirdly, according to the first and most simple notion of a civil society, the civil power is originally vested in the collective body of such society. Whenever therefore any civil governours are appointed; the degree and extent of their power will depend upon the constitutional laws: their authority can neither be more<sup>1</sup> nor less, than these laws, or rather than the people, by compact in consequence of these laws, have intrusted them with. From hence it appears, that their power, if it is limited by the constitution, does not extend beyond these limitations: and where their power fails, the subjection of the people ceases.

Fourthly; though the governours of a society should be invested by the constitution with all civil power in the highest degree and to the greatest extent, that the nature of civil power will admit of; yet this does not imply, that the people are in a state of perfect subjection. Civil power is in its own nature a limited power; as it arose at first from social union, so it is limited by the ends and purposes of such union: whether it is exercised, as it is in democracies, by the body of the people, or, as it is in monarchies, by one single person. But if the power of a monarch, when he is considered as a civil governour, is thus limited by the ends of social union; whatever obedience and submission the people may owe him, whilst he keeps within these limits; he has no power at all, and

<sup>1</sup> See B. II. C. VI. § II.



consequently the people owe him no subjection, where he goes beyond them.

Having thus taken a short view of the several ways, in which the authority of the civil governours of a society fails, and the subjection of the people ceases, we may now return to the question, which was before us. If you ask, whether the members of a civil society have a right to resist the civil governours of it by force? your question is too general to admit of a determinate answer. In some circumstances the people can have no such right; in other circumstances they may have such a right. As far as the just authority of the civil governours and the due subjection of the people extend; resistance by force is rebellion. Subjection consists in an obligation to obey: as far therefore as the people are in subjection; they can have no right to resist: because an obligation to obey and a right to resist are inconsistent with one another. But the power of civil governours is neither necessarily connected with their persons, nor infinite, whilst it is in their possession. It ceases by abdication; it is over-ruled by the laws of nature and of God; and it does not extend beyond the limits, which either the civil constitution or the ends of social union have set to it. The power therefore of the civil governours of any society fails of right, that is, they have no just authority; where they have abdicated what power they had; where they command what is contrary to the law of nature and of God; where they usurp any branch of civil power, which the constitution of their country never gave them; or where they exercise a power, which is inconsistent with the ends of social union, and consequently which no civil constitution whatsoever could give them. Where their power thus fails in right, and they have no just authority, the subjection of the people ceases; that is,

as far as of right they have no power, or no just authority, the people are not obliged to obey them; so that any force, which they make use of either to compel obedience or to punish disobedience, is unjust force: the people may perhaps be at liberty to submit to it, if they please; but because it is unjust force, the law of nature does not oblige them to submit to it. But this law, if it does not oblige the people to submit to such force, allows them to have recourse to the necessary means of relieving themselves from it, and of securing themselves against it, to the means of resistance by opposing force to force, if they cannot be relieved from it and secured against by any other means.

XI. In stating the question concerning resistance, I have chosen to call one of the parties the governours, or rather the persons, who are invested with the civil power of a society, and to call the other party the people or the members of that society; that I might avoid speaking of them in this question under the relation of governours and subjects. For though the two parties do stand in this relation to one another; yet the relation itself is a limited one; it is limited in the same manner with the civil power of the former and with the subjection of the latter. As far as one of these parties has just authority and the other of them owes subjection; so far they are governours and subjects: but where the authority of the former, and the subjection of the latter cease; that is, where the former have no right to command or to compel, and the latter are under no obligation to obey or to submit; there this relation ceases, and they are not to be considered as governours and subjects.

Relation  
of govern-  
our and  
subject is  
a limited  
one.

I have indeed, for want of a better word, spoken of the former under the name of governours: and this word, in the common acceptation of it, has a relative

meaning. But I have at the same time endeavoured to shew the reader, that I would have him understand it here rather in an absolute, than in a relative sense, by informing him, that, when I speak of governours, I mean those persons in a civil society, who are invested with the civil power of it.

The question, as we usually find it stated, is ; whether subjects have a right to resist their civil and constitutional governours ? When the two parties concerned in the question are thus spoken of under such names, as import the relation, which they bear to one another, and in consequence of which one has a right to command and the other is obliged to obey ; we are first led by the terms of the question to imagine, that it regards them in this relation, that is, that it regards them in such cases as this relation extends to, and then to answer it in the negative : for where one of the parties has a right to command and the other is obliged to obey ; the latter can have no right to resist : because an obligation to obey is inconsistent with a right to resist. But since this question regards the two parties, when this relation ceases between them ; that is, since it regards them in those cases only, to which the authority of the one and the subjection of the other does not extend ; if we state it in such a manner, as not to mix this relation with the terms of it, the true answer will be more plainly seen and more readily admitted.

But if any one chuses to state the question in the usual manner, and apprehends, that there may be some fallacy in stating it otherwise, there is no occasion to dispute this point with him. For let him state it as he will ; the power, or authority, which the constitutional and civil governours of a society have over their subjects, ceases by abdication ; and even whilst they are possessed of this power or authority, as they are



only human, constitutional, and civil governours, it is limited by the natural and revealed laws of God, by the laws of the national constitution, and by the ends of civil union. He may therefore give them the name of governours, and he may likewise give the people the name of subjects, even beyond these limitations, if he thinks proper: but still the former can only be called governours and the latter can only be called subjects in words; for beyond these limitations the relation of governours and subjects ceases in right.

XII. St. Paul uses the word—power, to signify a ruler or a person invested with power, where he says, <sup>m</sup> “that rulers are not a terror to good works, but to evil; wilt thou then not be afraid of the power? do that which is good and thou shalt have praise of the same.” He certainly here means the same thing by power and by ruler; since they who do good can no otherwise have praise of the power, than by having it of the ruler, who is invested with the power. The word is used in the same sense, when we ask, whether it is lawful to resist the supreme power? we intend, or should intend, to ask, whether the people or members of a civil society have a right to make use of any forcible resistance, in opposition to such rulers or governours of the society, as are invested with supreme power?

Resistance  
to the su-  
preme  
power  
how to be  
under-  
stood.

They therefore who deny, that the people have such a right of resistance, gain very little advantage to their side of the question by changing the words of it from civil power to supreme power. For the power of civil governours even in the highest degree of it is only human power, and is only civil power. They may call it supreme power with a design of setting it clear of any constitutional limitations: but if it has no other limitations, it will at least be limited by the laws of nature

<sup>m</sup> Rom. XIII. 3.

and of God, and by the ends and purposes of civil union.

Right of  
resistance  
does not  
imply su-  
preme ci-  
vil power  
in the peo-  
ple.

XIII. In this state of the question, — Whether the people have any right to resist the supreme power? — it is usually urged in contradiction to such a right; that the people, if their power is inferior to the power of the civil governours, must be obliged to submission, and consequently can have no right of resistance. But it is absurd to say, that the power of the people is equal or superior to the power of the civil governours, when those governours are supposed to be invested with supreme power: because in saying this, we suppose a power in the people, which is equal or superior to the supreme.

Two ways have been thought of for avoiding this supposed absurdity. One of these ways is, by maintaining, that all civil constitutions whatsoever are ultimately perfect democracies, or that every where, without exception, the supreme civil power is vested in the people and not in the constitutional civil governours. The other way is, by maintaining, that in all civil constitutions whatsoever there is a mutual subjection of the civil governours and of the people; that the former have the supreme civil power, when they govern well; but that the latter have it, when they govern ill.

But I cannot make use of either of these opinions, after what I have<sup>n</sup> said about them: if I have shewn the falshood of them, I cannot make use of them consistently with truth: and though I may have failed of doing this, yet I cannot make use of them consistently with myself. I must therefore endeavour to clear up this supposed absurdity by some other means.

The right or liberty of resistance, which belongs to the people, is not properly a civil power, but a natural right: it is not an authority, which civil union gives

them; it is only what remains of natural liberty exempted from the obligations of civil union. The constitutional civil governours are, by the supposition, invested with the supreme power. But this power, since it is only civil power, is limited in its own nature: it is limited by the ends and purposes of civil union. Beyond these limits therefore the natural rights or natural liberties of the people still subsist, the civil governours have no power and the people owe them no subjection. This right of the people may perhaps at first sight appear to be a civil power; because it seems to arise out of the social compact, or at least to depend upon this compact. But it no otherwise depends upon the social compact, than as this compact does not extend to it. The social compact limits the civil power of the constitutional governours to the purposes of civil union: and this limitation is the foundation of the peoples right to resist tyrannical power: not because it gives them any power, which nature had not given them; but because it leaves them in possession of their natural liberty. They had naturally a right of resisting injuries by force. As far as the ends of civil union require this natural right to be given up or restrained, so far it is given up or restrained either mediately or immediately, by civil union. But as far as these ends do not require this right to be given up, so far it still subsists in a state of civil society.

You will now perhaps see, that when you ask, whether the people's right of forcibly resisting the tyranny of civil governours is superiour, or inferiour, or equal to the supreme power, with which we have supposed those governours to be invested, the question is an improper one. The right of the people and the power of the governours differ from one another in sort, and therefore cannot be compared as to degree: neither of them can with any propriety be said to be



superiour, or inferiour, or equal, to the other. The supreme power of the governours is a civil power : the right, which the people have, to resist tyrannical oppression is a natural right. The supreme power of the governours arose from civil union, and was vested in them by the law or compact, which formed the constitution : the right, which the people have to resist tyrannical oppression, arose from nature, and subsists after civil union by means of the limits, which the ends of such union have fixed to all civil power.

If we were to maintain, that the people's right of resistance is civil power, and were to suppose at the same time, that the constitutional governours have supreme civil power ; we might easily be reduced either to the absurdity of supposing, that there is a civil power in the people, which is superiour to the supreme, or else to the necessity of allowing, what we before denied, that in all constitutions of government the supreme civil power is vested in the people. But by looking into the origin of the people's right to resist unsocial and tyrannical oppression, we find it to be a natural right and not a civil power. All mankind in a state of equality had a natural right to resist injuries : and the right which they have in a state of society to resist unsocial any tyrannical oppression, is only so much of that natural right, as is not brought under civil subjection by the social compact. What we maintain therefore is, that the people have such a right of resistance, as we have been speaking of ; not because they have a civil power, which is either equal or superiour to the supreme civil power of their constitutional governours ; but because this supreme civil power on the one part, and consequently the civil subjection of the people on the other part, is limited by the ends and purposes of social union ; so that beyond

this limitation the natural right of resisting injuries still remains, even after mankind are united into civil societies and have invested their constitutional governours with supreme civil power.

XIV. The general question, says <sup>a</sup> Grotius, concerning resistance is, whether the members of a civil society have a right to resist either the supreme civil governours of it or inferiour magistrates, who act by the authority and under the commission of such governours? It is acknowledged indeed by all, who have any sense of duty, that, if the supreme governours enjoin any thing, which is contrary to the law of nature or to the commands of God, we ought not to obey them. But if they do us any injury; either because we thus refuse to obey them; or because upon any other account it is their will and pleasure; is this injury rather to be submitted to, than resisted by force? I have rendered this latter sentence interrogatively; though from the present manner of pointing it in all the editions of our author's work, that I have seen, we may collect, that it is commonly supposed to contain rather a full declaration of his opinion, than a question, what the true opinion is. But whoever will be at the trouble of considering the construction of the sentence itself, and of comparing it with what goes before and with what follows it, will find reason to think, that our author only designed here to state the question, and not to determine it.

Opinion  
of Grotius  
explained.

But be this as it will; when he comes to declare his own opinion, he plainly favours the doctrine of non-resistance, though not without some restrictions. At the same time he cautions his readers to observe, that many acts of the people, which go under the name of resistance against their civil governours, do not come within his notion of unlawful resistance. It may be proper for us to consider in the first place what particular instances of resistance he allows of, and upon what principle he

<sup>a</sup> L. I. C. IV. § I.

allows of them : because some of these principles, when they are fully explained, will help us to correct his opinion upon the general question.

First, <sup>b</sup> if an absolute monarch, or any civil governours, who have been invested with with supreme power, abdicate or otherwise plainly relinquish this power ; Grotius allows, that the people have then a right of resisting them by force : because whatever power they may have been invested with, an abdication or dereliction of it brings them back into the condition of private persons.

He extends the right of resistance, upon this principle, farther than the case of a voluntary dereliction. For though he had observed, that where the supreme civil governours are chargable with some instances of negligent administration, these neglects cannot reasonably be construed as an evidence of their intention to relinquish their supreme power ; yet where they become open and declared enemies of the society, such hostile conduct is, in his opinion, an evidence, that they have no intention to govern it, and consequently is a dereliction or forfeiture of that power. For the protection of the society, or the security and advancement of its general good, is included in the notion of civil government. An intention therefore to govern and an intention to destroy are inconsistent with one another. Grotius has left his readers to conjecture what acts of hostile conduct he would allow to be an evidence, that the supreme governours of a civil society are become enemies to it. He seems to have had in his mind such a high degree of oppression, as consists in nothing less, than an endeavour to extirpate the society : for he declares in general, that no king, who governs only one society, can be supposed capable of such hostile conduct, as he means, unless he is out of his senses ; and that even, where a king governs two societies, his

<sup>b</sup> *ibid.* § IX.



attachment to one of them, can no otherwise lead him to such conduct, than with a view of making room in the territories of the other to bring colonies thither from his favourite society. But whatever high degrees of tyranny Grotius might here have in his mind; if the principle, from whence he argues, will prove, that civil governours forfeit their supreme power by endeavouring to extirpate the society: the same principle will likewise prove, that they forfeit this power by exercising such lower degrees of oppression, as necessarily destroy the welfare of it; though perhaps they may not destroy the existence of it. The welfare of a society, as well as the preservation of its being, is included in the purpose of civil government; no person therefore can at the same time have a will to govern the people, and a will to hold such a conduct, as is plainly inconsistent with their social welfare.

Grotius, as we shall see presently, maintains, in the general question concerning the right of resistance, that the people have no right to resist civil governours, who are in actual possession of supreme power. But in the mean time, as he was disposed to provide in some measure, if not for the welfare, yet at least for the existence of civil society, he maintains, that civil governours, with whatever power the constitution may have originally invested them, forfeit that power, when they become enemies to the public. Upon this principle the right of the people to resist a tyrant, who has been invested with supreme power, does not imply a right to resist a civil governour, who is in actual possession of supreme power: because such a right of resistance, as this, does not begin; till the civil governour, by a forfeiture of his supreme power, is reduced to the condition of a private person.

But we may observe by the way, that the supposition of a forfeiture of supreme power is not necessary to prevent this power and the right of resistance from interfering with one another. When civil governours degenerate into tyrants; whether they forfeit their supreme power, or continue in possession of it; to resist them in the exercise of a tyrannical power, and to resist the supreme civil power, is not the same thing. Supremacy of civil power does not imply, that they, who are possessed of it, have a right to do whatever they please. The notion of supremacy implies indeed, that their power is under no constitutional restraints from without. But still it is only civil power, and is therefore under a natural limitation from within: it is limited in its own nature to the ends and purposes of civil union. The people therefore by resisting a civil governour, who is possessed of supreme power, in such acts as are contrary to the ends and purposes of civil union, do not resist the supreme power: for such acts, since they exceed the natural limitations of all civil power, even in the highest degree of it, are not acts of the supreme power.

When we speak of supreme civil power in the abstract; we may easily prove, that the members of a civil society have no right to resist it. The notion of supreme civil power implies a right to direct and to compel; and as far as there is such a right on one side, there can be no right to disobey or to resist on the other side. From hence it will follow, that civil governours, who are in possession of this power, cannot lawfully be resisted in the exercise of it. But it will be no consequence, that they cannot lawfully be resisted, when they exceed the natural limitation of supreme civil power by exercising such an unsocial power, as is not included in the notion of it, and as they were ne-

ver invested with. The double sense of the words—supreme power—has probably been the occasion of some mistakes in this question. Sometimes they signify this power in the abstract : and sometimes they signify a civil governour, who is invested with this power, that is, a supreme potentate. St. Paul, as we have observed, uses the words in this latter sense, when he commands christians to be subject to the higher or supreme powers. Now since it is unlawful to resist the supreme power in one sense we are apt to conclude, that it must likewise be unlawful to resist the supreme power in the other sense.

But if, instead of speaking of civil governours under the abstract name of supreme powers, we would call them supreme potentates ; we should find, that this conclusion is a mere fallacy, and has nothing to support it, besides the ambiguous sense of the words—supreme power.—

However unlawful it may be to resist the supreme power, when this power is considered in the abstract, it will not follow from hence, that it must be equally unlawful to resist supreme potentates. The notion of supreme power when we consider it in the abstract, includes its natural and due limitations : it is nothing else but the highest degree of civil power, that is, of a power to direct and to compel the several members of a civil society to act in such a manner, as the common benefit and general security requires : and since the several members have by their civil union agreed to form such a power, the same consent, by which they formed it, obliges them to pay obedience and submission to it. When this power is by the constitution lodged in the hands of certain persons ; these persons become the supreme potentates of the society, and are usually called by the abstract name of supreme powers. As far as these supreme powers, or supreme potentates, exercise only the civil power, it is unlawful to resist them ;



for as the people are obliged to pay obedience and submission to the power, with which they are invested, it cannot be lawful to resist them in the exercise of this power. But supreme potentates have a natural strength in their hands, which may possibly be abused : though the supreme power is limited in its own nature to the purposes of civil union ; it is possible, that they may be disposed to exercise this natural strength to contrary purposes. To resist them in this undue exercise of the natural strength, which is in their hands can no otherwise be called resistance to the supreme power, than as these supreme potentates are themselves called by this abstract name. In the mean time it is such a resistance, as cannot be shewn to be unlawful. However the people may be obliged to obey them and to submit to them, when they exercise the supreme civil power ; it does not follow, that there is the like obligation, when they exercise any other power : and where there is no obligation to obey and to submit ; the law of nature allows of resistance.

From hence we may understand, what it is, that puts the difference between rebellion and such resistance as is lawful. It is rebellion to resist the supreme governours, whilst they keep within the natural limitations of supreme power, and only command or enforce what is necessary or conducive to the 'general welfare and security. Whereas the resistance, which is lawful, is a resistance to these governours, when they abuse the natural strength, which the supreme power has put into their hands, to the unsocial purposes of tyranny and oppression.

From hence likewise we may understand what answer is to be made, when we are asked, whether it is lawful to resist the supreme power, if the commonwealth cannot otherwise be preserved ? If by supreme

power is here meant supreme power in the abstract, the case which the question supposes is impossible. For supreme power, in this sense of the words, is a power which operates only for the general benefit : and it is a contradiction to suppose, that the preservation of the commonwealth should ever require us to resist such a power, as this. Or if supreme power means the supreme potentates, or supreme governours of a society ; before we can answer the question here proposed, it will be necessary to enquire, whether it relates to them, when they exercise only the civil power, with which they are entrusted, or when they exercise an exorbitant power, which does not belong to them. In the former of these senses, instead of answering the question in the negative, we might observe, as we did before, that it supposes a case, which is impossible or implies a contradiction. Civil power in the highest degree, that the nature of it will admit, is limited to the purpose of advancing or securing the general welfare : and such a power, whether we consider it as it is in its own nature, or as exercised by any particular persons, in whom the constitution has vested it, cannot be inconsistent with the preservation of the commonwealth. But in the latter sense we may answer this question in the negative ; for though the supreme potentates or, as they are sometimes called, the supreme powers of a civil society cannot lawfully be resisted, where they exercise only the social power, which was produced by civil union, and is vested in them by the constitution ; yet where they exercise an exorbitant power, which is inconsistent with the preservation of the society, they may lawfully be resisted. The supreme civil power, of which they are possessed, gives them no right to exercise this exorbitant power : and where they have no right to act, there is no law of nature, which obliges the body of the society to submit to them.

But to return to our author. Barclay, <sup>d</sup> he says, is of opinion, that a king, notwithstanding he has been invested with supreme power, forfeits his power by alienating it; where the laws have either settled the succession to the crown, or have made the crown elective. Grotius is doubtful upon this head; and rather inclines to the contrary opinion. Where the tenure of the crown is of the usufructuary sort, he thinks, that the king by alienating it does nothing, and consequently that the alienation can produce no effect. The conclusion, which he leaves his readers to deduce from hence is, that such an alienation, since it produces no effect, cannot produce a forfeiture. In support of this opinion he alledges the Roman law concerning usufruct. But without enquiring what any positive law may determine in other cases of usufruct; let us enquire what the law of nature or reason will lead us to determine in the case of an usufructuary kingdom. In respect of the person, to whom the king, that is in possession, intends to transfer the supreme power, his act will produce no effect: the act is void in itself, and cannot make a valid transfer. But the question is, Whether this act will produce no effect in respect of himself and of the people; whether, though it is void, as a transfer, it may not be valid, as a forfeiture? Some writers consider such an alienation as two distinct acts: it imports, they say, an intention in the king to give up the kingdom for himself, as well as an intention to transfer it to another. And though they allow, that the latter of these acts is void, or produces no effect, because he has no power to transfer what he holds by usufruct; yet they contend, that the former act is valid, because he has a power of relinquishing what he so holds. This however is a groundless distinction: his act imports only an intention to give up his king-

<sup>d</sup> Ibid. § X.



dom for the particular purpose of transferring it to a certain person; it does not import an intention of parting with it either absolutely or for any other purpose. We may say with more reason, that he holds his kingdom by a compact between himself and the people, under a law, which, by the supposition, has either fixed the succession to the crown or made it elective. This alienation therefore, as it is inconsistent with this law, is a breach of the compact on his part; and this releases the people from it on their part.

But be this as it will; Grotius, even whilst he doubts, whether such an act of an usufructuary king amounts to a forfeiture, and is rather inclined to think the contrary, maintains, that if the king attempts to make the transfer good in fact by delivering up the kingdom, the people have a right to resist this attempt by force. Supremacy of civil power, and a supreme claim or a claim of full property to this power, are different things. If any constitution, which has invested a king with supreme power, has at the same time made the crown elective, or settled the succession so, as to make it unalterable without the consent of the people; he holds the supreme power, whilst he is in possession of it, only by an usufructuary tenure, and consequently has no right to alienate it. Nor can he give himself such a right by virtue of his supreme power: for the tenure, by which the supreme power is held, is not subject to the jurisdiction of this power: the law, which established it, came originally from the body of the society, and was made binding upon him by means of a compact, to which he consented either expressly, when he accepted the crown, or tacitly by accepting it under such a restriction, as this law laid it under. But if he is thus bound by a compact with the people not to alter the tenure of the crown and make it patrimonial,

when the constitution has made it usufructuary; the people have a right to oppose such an alteration, and to make use of force in opposing it, when they cannot prevent it by any other means.

As Grotius allows in the first place, that the people have a right to resist such civil governours, as have been invested with supreme power, when they have abdicated or forfeited this power; so he allows secondly, that they have the like right, either where the constitution has laid the civil governours under any special limitations, besides what arise from the nature of civil power, or where it has reserved any special liberty to the people, besides what is included in the notion of civil subjection.

The example, which we have been considering, seems, as Grotius explains it, to be of this latter sort: for whilst he is inclined to think, that an usufructuary king does not forfeit his crown by attempting to alienate it; he maintains, that the special tenure of the supreme power, which the constitution has settled in such a kingdom, will give the people a right to resist such an attempt of the king.

In one of the cases, where <sup>e</sup> he allows a right of resistance in the people, we cannot properly say, that there is a constitutional limitation upon the supreme power of the civil governours: because the case supposes the supreme power to be vested in the people, and the civil governours, who have the lead occasionally in public affairs, to be made accountable to the people, by the constitution. The Spartan constitution was of this sort. It was a nominal kingdom, but a real democracy. The kings were indeed empowered to act for the state, but were made accountable to the people, or to officers, who stood in the place of the people.

<sup>e</sup> Ibid. §VIII.

Grotius observes, that wherever such a constitution has been settled from the first, or is settled afterwards by mutual agreement between the king and the people, there is a right in the people not only to resist the king by force, but even to punish him, when he offends against the laws of the society, or acts inconsistently with the welfare of it. But what our author here calls resistance is rather an exercise of constitutional power: the case supposes the supreme power to be vested in the people, and the power of the king to be made subordinate to theirs by the constitution.

In mixed forms of government, where the king has some parts of the supreme power and the people have some other parts of it, <sup>f</sup> Grotius allows the people to have a right of resisting the king by force, if he invades those parts of the civil power, which belong to them: because as far as the power extends, which is reserved to them by the constitution, the king has no authority and the people are not in subjection. This right of the people to make war in defence of their constitutional power may perhaps be questioned, if the civil power of making war is vested in the king. But Grotius replies, that the civil power of making war, which is here supposed to be vested in the king, relates only to foreign wars, and means nothing else but the ordinary right of directing the common force of the society against its enemies from without: it does not relate to such an extraordinary use of force, as may be necessary for maintaining the constitutional rights of the people against any attempts to invade them from within. The constitution therefore may have precluded the people from making war upon their own authority against the foreign enemies of the society: but as the same constitution has, by the supposition, reserved to the people a right to some parts of the supreme power, it must be

<sup>f</sup> Ibid. § XII.



understood to leave them at liberty to defend themselves by force in the possession of this right, if they cannot secure it by any other means. To suppose that the people have a right, and yet that they are not at liberty to defend this right by such means, as are necessary, is a contradiction; it is to suppose, that they have a right, and that they have no right at the same time.

Grotius does not here consider the supremacy of the people as the foundation of their right of resistance: he argues in favour of such a right from this general principle, that as far as the power of the people extends, their civil governours have no authority over them, and they are not in subjection. In the next example he argues still more plainly from the same principle; whilst he maintains, that the people may have a right of resistance, though they have no part of the supreme power. § He supposes a society to have established a despotic constitution by giving the whole civil power both legislative and executive to the king, but at the same time to have expressly reserved a right of resistance to the people upon some certain events. Reserves of this sort are, he says, a just foundation of resistance, when these events happen: because, though they do not imply, that the people have retained any part of the supreme power, yet they imply, that the people have retained some part of their natural liberty, and, as far as these reserves extend, have exempted themselves from subjection.

We may observe, that the principle, upon which our author proceeds, in these two examples, to support the particular right of resisting unconstitutional usurpations of power, is the same, that <sup>h</sup> we made use of above to support a general right of resisting all unsocial and tyrannical oppression. Where the constitution has limited the power of civil governours by a

§ Ibid. § XIV.

h See sect. XIII.

division of the supreme power between them and the people; or where it has in part exempted the natural liberty of the people from subjection by any positive reserves; Grotius considers these constitutional limitations or reserves, as the foundation of a right of resistance; because the civil governours have no authority and the people are not in subjection, beyond such limitations or reserves. Now civil power on the one hand, though it is under no positive or constitutional limitations, is limited in its own nature by the ends and purposes of civil union: and the notion of civil subjection on the other hand implies, that they, who owe no other subjection, retain as much of their natural liberty, as is consistent with the same ends and purposes; whether the constitution, under which they live, has made any positive reserves of it or not. So that beyond these natural limitations and reserves the civil governours have no authority, and the people are not under subjection, in any constitution or in any form of civil government whatsoever. Thus the same principle, which led our author to conclude, that the people may lawfully resist the civil governours of a society, where these governours exceed any constitutional limitations, which have been set to their power, or where the people have expressly made any constitutional reserves of a part of their liberty, may lead his readers to conclude farther, that the people have a general right of resistance; where the civil governours, even though they are invested with supreme power, exceed the natural limitations of all civil power; or where they break in upon that part of the natural liberty of the people, which is reserved to them of right, by the very notion of civil subjection, under every possible form of civil government.

But Grotius, whilst he furnishes his readers with this principle, does not follow it himself so far as it would have led him. For in examining the general question, Whether the members of a civil society have any right of resisting such civil governours, as are invested with supreme power? he favours the negative part of it, and endeavours to support his opinion by arguing partly from the nature and ends of civil society, and partly from what he supposes to have been the doctrine of St. Paul and St. Peter. He allows however, that the members of a civil society have such a right in cases of extreme necessity; except where they suffer for the religion of Christ, and there he thinks, that it is their duty to submit patiently, if they cannot save themselves by flight.

What he urges <sup>i</sup> from the nature and ends of civil society is of no great importance, and he does not seem to lay much stress upon it. “A civil society, he says, as it is instituted for the purpose of securing the common tranquility, has a general power of restraining and controlling its several members, as far as such a power is necessary for obtaining this purpose: and in particular it has a power, in view to the public peace and order, to restrain and over-rule that promiscuous right of resisting injuries, which individuals were possessed of in a state of nature. As a civil society has this power, so we may be sure, that it was the intention of mankind, when they formed themselves into such bodies, to make use of it: because if this promiscuous right of resisting injuries is not restrained and over-ruled, civil society could not obtain its proper purpose of securing the public tranquility. There might indeed be an assembly of men, though each of them continued to have this right; but it could only be a confused and unconnected assembly; it could not be a civil society.” But

<sup>i</sup> Ibid. § II.



the conclusion, which Grotius here endeavours to establish, will not determine the question, which is now before us. Though we grant, that the promiscuous right of resisting injuries, which mankind were possessed of in a state of nature, is restrained and over-ruled in a state of society; yet it will not follow from hence, that their whole right of resisting injuries is thus restrained and over-ruled: they cease to have a promiscuous right of resisting injuries; but it is no consequence, that they have no right of resistance at all. Our author in order to support his own opinion should have proved, not merely, that the members of a civil society have not the same promiscuous right of resisting injuries, which they had in a state of nature, but that civil union destroys the whole right of resisting injuries, or at least the right of resisting such unsocial injuries, as are done to them by their civil governours: because, though they have not a promiscuous right of resisting all injuries whatsoever, they may possibly have a right of resisting the unsocial and tyrannical oppression of their civil governours. It must be allowed, that civil societies were instituted for the purpose of securing the common tranquillity. But this tranquillity does not consist in setting still and doing nothing, or in patiently submitting to injuries, without endeavouring to repel them for the present or to guard against them for the future. If this was the notion of that tranquillity, which the institution of civil society has in view, we might easily prove, that all resistance of injuries whatsoever is contrary to the nature of civil society. But the common tranquillity, which civil union was intended to obtain, consists in the quiet and peaceable enjoyment of our rights, that is, it consists in a security against suffering injuries: and from this purpose of civil union we can only infer, that it restrains the promiscuous right of resistance, as far as

is necessary to prevent mankind from doing injuries to one another, and not that it destroys their whole right of resistance by obliging them to submit to injuries without seeking for redress. Where the members of a society injure one another, they are restrained from doing themselves justice by their own force and at their own discretion ; because under the notion of doing themselves justice, they might possibly injure others ; and not because they are obliged to sit still, whatever they suffer : for civil society, though it does not allow the sufferers to redress themselves, makes a provision for redressing them by means of the public force under the conduct of the public understanding. But where the governours of the society, who have the keeping of the public understanding, and act with the public force, injure the members of it by tyranny and lawless oppression ; the social means of redress fail ; and no other means are left, besides resistance. It is true indeed, that in a society, where the people have recourse to these means, there is no social peace and order. But it is equally true, that the social peace and order are not broken in upon by such resistance as is lawful : for resistance is then only lawful, when this peace and order have been already broken in upon by tyranny and oppression. Some sort of peace and subordination may indeed subsist in a civil society, notwithstanding the governours of it violate all the social rights of the people ; provided the people will sit still and will quietly submit to the injuries, which they suffer. But this is not social peace and order : for such peace and such order, as mankind intended to produce and to secure by civil union, are disturbed by tyranny and oppression. The right of resistance therefore, as it does not take place, till social peace and order are thus disturbed, cannot be the cause which disturbs them : it

finds them disturbed already ; and its proper end is to restore them for the present, and to secure them for the future.

Before we enquire what St. Paul has taught us upon this head ; it will be proper to remind the reader, that the right, which is here contended for, does not imply, that all forcible resistance of the members of a civil society against the governours of it is lawful, or that the governours have no authority and that the people owe no subjection. On the contrary we maintain, that the governours of a civil society have authority to command and to compel, and that the people are obliged of right to obey and to submit, as far as the purposes of civil union extend. Though a right of resistance begins beyond these limits ; because the civil power of the governours and the civil subjection of the people end here ; yet all resistance within these limits is contrary to the law of nature, that is, to the duty, which naturally arises from social union and the appointment of civil governours. When St. Paul therefore <sup>k</sup> enjoins subjection, and forbids resistance, the question is, What sort of subjection he enjoins ; and what sort of resistance he forbids ? Whether he enjoins only such subjection, as is properly called civil subjection, and is limited by the ends, for which mankind formed themselves into civil societies, or such absolute subjection, as is implied in the notion of passive obedience ? Whether he forbids all resistance whatsoever, even against such tyranny and oppression, as is destructive of the ends of social union ; or such resistance only, as the law of nature has forbidden, a resistance to the governours of a civil society, where the nature and design of social union has given them authority to command and to compel, and has obliged the people to obey and to submit ?

<sup>k</sup> Rom. XIII.



Many of the first converts to christianity imagined, that their religion had set them free from all subjection whatsoever; that it discharged them both from the subjection, which they formerly owed to the civil magistrate, as they were members of society, and likewise from the subjection, which they owed to their masters, if they happened to be in a state of slavery, before they embraced it. If we read the apostolical epistles with any degree of attention, we shall see plainly, that this opinion generally prevailed at the time, when they were written, and that the writers of them took particular care to discourage and to disprove it. From the authority of St. Paul, when he commands "every soul to be subject to the higher powers", we may collect, that this opinion is false, but we can collect nothing farther. By giving this command he determines, that the obligation of civil subjection extends to all mankind, to christians, as well as to other men: but he does not determine, either that the subjection, which is due to supreme civil governors, is absolute and unlimited in its own nature, or that it was the design of the gospel to make it so.

Perhaps the reason, upon which St. Paul supports the precept of subjection, may induce you to think, that the subjection, which he enjoins, is absolute; though the words of the precept do not favour this opinion. The principle, upon which he enforces this duty, is, "That there is no power but of God, the powers, that be, are ordained of God:" you may therefore imagine, that nothing less than absolute subjection can be due to a power, which is established by so high an authority. But though he informs his readers, that the authority of God is the ultimate cause of their obligation to be subject to supreme governors; it is your inference and not his, that this

subjection must be absolute and unlimited. The power of supreme governours is established by the authority of God in the same manner, that any other power or right, which arises out of human compacts or human laws, is established by the same authority. They are the ordinance of man in their immediate origin: because their power is immediately derived from those compacts and laws of mankind, by which they united themselves into civil societies, and established certain forms of civil government. But they are ultimately the ordinance of God: because the law of nature and of God requires the observance of these compacts and laws, in the same manner that it requires the observance of all other obligatory acts of mankind, which are duly engaged in for beneficial purposes. You must understand St. Paul in this sense, when he calls civil governours the ordinance of God; or otherwise you will not easily reconcile him with St. Peter, who calls them the ordinance of man. Thus the reason, upon which he enforces the duty of civil subjection, will leave you to collect the measures of it from the nature and ends of civil union. The authority of God only confirms and establishes the power, which mankind have given to civil governours, and does not give them any extraordinary power beyond this. The extent therefore of their authority, and the subjection, which is due to them in consequence of it, must be determined by these human compacts and human laws, from which it is derived.

If you object, that the principle, which is here urged by the apostle, will answer no purpose, when it is thus explained; the objection is partly true and partly false. This principle will answer no purpose, when you alledge it to prove the duty of passive obedience and unlimited subjection. But it will fully

answer the purpose, for which he alledges it, and will clearly demonstrate the point, that he had undertaken to prove. We may learn from his own words what this point is. "Let every soul be subject to the higher powers". He undertakes to prove, not that the obligation of civil subjection extends to every act, which civil governours may possibly be led to do by an arbitrary pursuit of their own private interest, or by an undue indulgence of their passions and appetites, but that it extends to every soul, to christians, as well as to others. When he <sup>1</sup>elsewhere addresses himself to slaves, he commands them to "submit themselves to their masters in all things". But when he addresses himself here to members of civil societies, the extent, which he gives to civil subjection, does not relate to the matter of it, but only to the persons concerned in it: he does not command them to be subject to the higher powers in all things, but only enjoins subjection as a duty, to which all persons are obliged. His plain design is to correct the mistaken notion, which then prevailed amongst the new converts, that the gospel had discharged them from civil subjection. And the principle, which he alledges, affords an unanswerable argument against this notion. As the gospel had not discharged them from the duty, which they owed to God; they could have no reason to suppose, that it had discharged them from the duty of civil subjection: for civil governours are the ordinance of God: and consequently the duty of subjection to such governours is established by his authority.

Look farther into St. Pauls discourse, and you will find, that he represents civil authority, and the subjection, which is due to it, as limited to the ends and purposes of social union. "Rulers, he says, are not a terror to good works, but to the evil. Wouldest

<sup>1</sup> Col III. 22.



thou then not be afraid of the power? do that, which is good; and then thou shalt have praise of the same: for he is the minister of God to thee for good. But if thou doest that, which is evil, be afraid: for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him, that doeth evil". You see in what light St. Paul considers civil governours, whilst he enjoins the duty of subjection: the rulers, that he is speaking of, are such as no man, who does what is good, need be afraid of. You see likewise how far and in what respects he considers civil governours as the ordinance of God: they are ministers of God for good to those, who do well, and ministers of God for wrath to those, who do evil. If therefore we were to contend, that obedience and submission are not due to civil governours, when they are considered in this character; you might urge either the authority of St. Paul to over-rule our opinion, or the principle upon which he argues, to confute it. But if you carry the notion of subjection farther, than he has carried it; neither his authority, nor the principles, from which he argues, will be of any use to you. He enjoins, that every soul should be subject to the higher powers: but whilst he enjoins this duty of subjection, he considers these powers as patrons of what is good, and as a terror to what is evil; that is, he considers them as pursuing the purposes of social welfare and social security. You cannot therefore alledge his authority in favour of a like duty of subjection, when they counteract and defeat those purposes, and become patrons of what is evil, and a terror to what is good. The principle, from whence he argues in support of the subjection, that he enjoins, is, that civil governours are the ordinance of God: but he informs

his readers at the same time, how far and in what respects he considers these higher powers as the ordinance of God : they are ministers of God for the purposes of social security and social welfare, for the punishment of evil doers and for the praise of them, that do well. You cannot therefore infer from this principle, as he has explained and limited it, that there is the same obligation to subjection, where they counteract and defeat these purposes by making themselves, what man never designed them to be, and what God's ordinance never made them, the ministers of their own malice or revenge, of their own avarice or ambition, of their own lust or cruelty.

If St. Paul's notion of civil subjection does not favour your doctrine of unlimited submission and passive obedience, you will gain very little advantage to your cause by having recourse to what he says about resistance. "Whosoever therefore resisteth the power resisteth the ordinance of God ; and they, that resist shall receive to themselves damnation". The words indeed are general ; and if you take them separately, they may seem to import, that all resistance to civil governours is unlawful ; as well where they exceed the limits, which are set to their power by the purposes of social union, as where they act within these limits, and pursue these purposes. But if you observe the manner of expression, you will find that the words, now in question, contain a consequence, which the apostle deduces from what he had been saying before. He had before enjoined the duty of subjection ; and from this duty he here infers the unlawfulness of resistance. But we cannot suppose, when he thus infers the unlawfulness of resistance from the duty of subjection, that he designed to make the consequence more general than the premises, or that he meant any other sort of resistance, besides what is contrary to the duty

of subjection, which he had before enjoined. Since therefore the duty of subjection, which he had before enjoined, is limited by the purposes of social union; his meaning when he infers from this duty, the resistance is unlawful, must be restrained by the same limitations. You consider supreme governours as the ordinance of God in whatever they do. If this principle of yours was true, the consequence would be, that to resist supreme governours in any thing would be to resist the ordinance of God. But St. Paul has shewn us, in what sense and how far he considered them as the ordinance of God, by representing them as the ministers of God only for the purposes of social welfare and social security. And the only consequence, that will follow from the apostle's principle, is, that to resist them, where they act for these purposes, is to resist the ordinance of God.

There is however no reason to think, that the word — damnation, — which our English translators have here made use of to express what St. Paul declares to be the event of such resistance, as he forbids, ought to be softened into the milder word — condemnation — and to be explained, as if he only meant, that they, who are guilty of such resistance, will be punished for it by the civil power, which they resist. Though unjust oppression and tyrannical cruelty may lawfully be resisted; yet there certainly is such a thing as criminal resistance or rebellion. This criminal resistance is what St. Paul is here speaking of: and since he declares it to be contrary to the law of God; we may reasonably believe, that, when he speaks of damnation as the event of it, he means, that they, who are guilty of it, will incur such penalties of this law as the word — damnation — in the usual sense of it imports. It would indeed be unsuitable to the whole tenor of St.



Paul's argument to suppose, that he only warns them of what they are likely to suffer from the sword of the civil magistrate. He set out with enjoining, that every soul should be subject to the higher powers; because these powers are established by the authority of God: and it would be a strange inference from hence, that, if we transgress this duty by rebellion, we shall suffer for it by the act of man. His general conclusion is, that "we must needs be subject, not only for wrath, but also for conscience sake:" and, though the external sanction of human punishment is a reason, why we should "be subject for wrath"; yet unless in what went before he had taken notice of some other sanction, besides this, the principal part of his conclusion, "that we must be subject for conscience sake"; would be unsupported.

When <sup>m</sup> Grotius alledges the authority of St. Peter in this question, he does not quote the apostle's words fairly. "Servants, says St. Peter, be subject to your masters with all fear, not only to the good and gentle, but also to the froward: for this is thankworthy, if a man for conscience towards God endure grief suffering wrongfully". This exhortation is plainly addressed to slaves: the measures of subjection therefore, which are to be collected from it, relate only to servile and perfect subjection. But Grotius in order to apply it to civil subjection, introduces it with the apostle's command of "honouring the king", which has no connection with it, but is the close of what went before. St. Peter is so far from countenancing this application, that on the contrary, when he addresses himself to the members of civil societies, he limits the authority of civil governors, and consequently the duty of civil subjection, to the purposes of social welfare and social security. In short the doctrine of St. Peter and of St. Paul is

<sup>m</sup> Ibid. § IV.

the same in both cases. When they are speaking to slaves; the former says, "Servants, be subject to your masters with all fear, whether they are gentle or froward; and the latter says, "Servants, be subject to your own masters in all things". But when they are speaking to members of civil societies; the former says, "Submit yourselves to every ordinance of man for the Lords sake, whether it be to the king as supreme, or unto governours, as unto them, that are sent by him, for the purpose of punishing evil doers, and for the benefit and encouragement of them, that do well"; and the latter says, Let every soul be subject to the higher powers, because they are the ministers of God for the benefit and encouragement of those, who do what is good, and for wrath to those, who do what is evil".

But Grotius though he favours the doctrine of passive obedience in some instances, does not maintain this doctrine in its full extent and utmost rigour. Whilst he supposes the duty of non-resistance to be established by a general law of civil society, he allows, as we have seen already, that this law admits of exceptions, both where the constitution of civil government has given the people a part of the supreme power, and likewise where it has expressly reserved a right of resistance upon some certain events. The only point therefore, in which the opinion here advanced differs from his, is, that in his opinion supreme civil power is unlimited in itself, and consequently they, who are in possession of it cannot of right be resisted; unless some express limitations have been set to their power, or some degree of liberty has been expressly reserved to the people, by the constitution: whilst we on the contrary maintain, that even supreme civil power is limited in its own nature by the ends and purposes of civil union, merely because it is only civil power; and that

the subjection, which is due to this power, is limited in the same manner and for the same reason : so that they, who are possessed of this power, may of right be resisted by the people, when they exceed these limits and counteract these purposes ; though no express limitations of their power, and no express reserves of the people's liberty, have been made by the constitutional form of civil government. " Grotius indeed so far agrees with us upon this point, as to allow, that the general law of non-resistance admits of a farther exception in cases of necessity, or that the people have a right in such cases to resist even supreme governours. But then he does not deduce this right, where he thus allows of it, from the nature of civil power or of civil subjection, but from an arbitrary reserve, which he supposes to have been tacitly made by mankind, when they united into civil societies ; though they have afterwards made no express reserve, when the respective constitution of each society was settled. He argues, that the universality of his supposed social rule or law which forbids resistance, is no reason against its admitting the equitable exception of necessity : because even the laws of God, though they are expressed in the most general and comprehensive terms, admit of the like exception. Our Saviour allows of it in the instance of the sabbath, and mentions with approbation a similar allowance in the case of David, who was permitted by the high priest to eat the shew-bread. For though God has an undoubted right to require, that we should obey his laws, even at the expence of our lives ; yet if he has not declared, that he requires such a strict obedience to any particular law, and if at the same time the matter of the law does not appear to be of such high importance, as will lead us to think, that he requires it ; even his laws are understood to admit of an ex-

<sup>n</sup> Ibid. § VII.



ception in favour of necessity, whether this exception is particularly mentioned or not. But if cases of necessity are thus excepted out of laws, which are prescribed by the authority of God, there is more reason for presuming, that they are excepted out of laws, which are prescribed only by the authority of man. Human laws may indeed require obedience even at the hazard of our lives: of this sort are military laws, which require a soldier to maintain his post, to whatever danger it exposes him, and punish him with death, if he deserts it. But we cannot upon any slight grounds suppose an human law to be thus rigid. It seems more probable, says our author, that mankind in respect of one another have no authority to over-rule this exception of necessity; unless where an equal necessity on the other side requires, that it should be over-ruled: because all human laws either are made, or ought to be made, with a proper regard to human weakness. What Grotius here calls the general law of civil society, is nothing else but the rule of action, which arises out of social union. The extent of this law therefore must, as he argues, depend upon the will of those, who associate themselves into civil communities. And if they were to be asked, whether they intend to bind themselves not to resist their civil governours, even though they must otherwise causelessly and unjustly suffer death; he thinks it unlikely, that they would answer in the affirmative. In the mean time he doubts, whether it might not have been their intention to lay themselves under even this rigid obligation in all cases, where they could not resist such violence, without producing confusion in the state, and occasioning the destruction of many innocent persons.

Grotius was aware, that as he thus rests the people's right of resistance, as far as he allows them to have

any such right, upon the presumptive intention of mankind, when they form themselves into civil societies, the rigid defenders of passive obedience would have an opportunity of objecting, that it is a divine and not an human law, which obliges mankind rather to submit to death, than to repel the lawless violence of their civil superiours by force. He had in some measure obviated this objection before, if the foundation of it was true, by observing, that even the laws of God admit of exceptions in favour of extreme necessity. But he adds here, that the objection is raised upon a false foundation: for mankind were not brought together and united into civil societies by any express command of God, but came together of their own accord, and were induced thus to unite themselves by a sense of their own inability to guard themselves against violence by their separate strength. Civil power therefore, which is the result of this union, was instituted by an human act: and the obligation of civil subjection is the immediate effect of an human compact and not of a divine law. In support of this opinion about the origin of civil power he alledges the authority of St. Peter, who calls it the ordinance of man, and then observes, as we have observed above, that, notwithstanding this ordinance of man, when it is once duly established, is confirmed by the divine law, and so becomes the ordinance of God; yet the authority of God, whilst it supports civil power, and enforces the duty of civil subjection, makes no alteration in either of them, but leaves the nature and the limits of them the same, that the act of man, from which they immediately arose, had originally made them.

Grotius extends this exception of extreme necessity as well to individuals repelling a private injury, as to the body of a community repelling such injuries, as

either immediately or in their consequences affect the public. Barclay, he says, who was a warm assertor of kingly power, allows, that the body of the people, or some very considerable part of this body, has a right to defend itself against the outrageous cruelty of its supreme governours, notwithstanding its general subjection to them. But for his own part, though he plainly understands, that in proportion as what is to be preserved, by an exemption from the obligation of a law, is of more value, the equity, which exempts it, is the stronger; yet he declares himself to be far from thinking, that even individuals, or however that a minority of the people, are to be condemned, if they defend themselves by force, under the favour of necessity; provided they do it in such a manner, as not to violate the regard, which they owe to the general good of the society.

The character, under which he here speaks of Barclay, may perhaps lead the reader to imagine, that the question concerning the lawfulness of resistance, relates only to absolute monarchies. For this concession will have no particular weight, merely because it is made by a warm assertor of kingly power, unless the doctrine of passive obedience is peculiar to a monarchical form of government. But in fact the question concerning resistance relates equally to all forms of government, except perfect democracies. In all other forms, there is one part of the society, which governs, whilst the other part is governed: and the governing part is invested with the supreme power either perpetually or for a time. If therefore in an absolute monarchy, where the king is invested with perpetual supreme power, the natural limitations of this power will give the people a right to resist him, when he is guilty of tyranny and un-social oppression; the same limitations will, under any



form of civil government, give that part of the society, which is in civil subjection, a like right to resist the tyranny and unsocial oppression of the governing part. And on the contrary, if these limitations will not support a right of resistance in other constitutions, they will not support such a right against an absolute monarch.

There is another point still to be examined, which, though it does not belong to natural law, may be proper to be taken some notice of. ° Our author is of opinion, that whatever right of resistance there may be in other instances, the gospel has made it unlawful for christians to defend themselves by force, where they are persecuted by their superiours even to death upon account of their religion.

One of the arguments, which he makes use of to establish this opinion, has nothing else to support it, besides the silence of our Saviour. He says, that Christ, when he allows his disciples to fly from persecution, allows no more. But this direction, to avoid persecution by flying from it, cannot well be construed as a prohibition of all other means. And there is the less ground for construing it in this sense; because Christ gives such a reason for it, as shews, that it was not intended to be a general direction to all christians, about what they may lawfully do to secure themselves against persecution, and much less to be a restrictive direction, which ties them down from doing any thing else. “When they persecute you in this city, flee ye into another: for verily I say unto you, ye shall not have gone over the cities of Israel, till the son of man be come.” We may collect from the reason here given, that the direction relates only to them, who were at that particular time commissioned to preach the gospel to the cities of Israel; before the son of man came in power to cast off the Israelites, from being the people

of God for rejecting the salvation, which was offered to them. Christ intended to inform those, whom he then sent, that the work, upon which they were sent, did not require them to stay in any place, where they should be persecuted. They were to preach the gospel in all the cities of Israel: and if, when they were persecuted in one city, they should flee to another, this would be no interruption of the work: because they had more places to preach in, than they could well go through in the time, which was allotted them. There is nothing in any part of the instructions then given to the apostles, which has the appearance of a design to restrain christians from making use of the same means, to defend themselves against suffering injuries upon account of their religion, that the law of nature allows in other cases; except that they were commanded not to take a sword. And this restraint is so far from extending to all christians, that we find it to have been afterwards taken off from the apostles themselves in such a manner, as shews it to have related at first to the particular commission, upon which they were sent, “When I sent you, says our Saviour, without purse and scrip and shoes, lacked ye any thing? And they said, Nothing. But now he that hath a purse let him take it, and likewise his scrip: and he, that hath no sword, let him sell his garment and buy one.”

Christ however refused to be defended by force against the injuries, which he suffered in his own person: and his patient induring of persecution is alledged to prove, that christians in general ought to submit with the like patience to any injuries, that they may suffer upon account of their religion. When St. Peter had drawn his sword in the defence of his master, he was admonished to put it up again; because all they, that take the sword, shall perish with the sword. But no

strefs can be laid upon this admonition, as it contains rather a prudential caution, than a rule of duty. It is a matter of temporal interest, and not of conscience, to avoid perishing by the sword: the fear of such an evil may produce an external restraint; but it cannot, when it is taken alone, produces an internal obligation. The only circumstance in what passed upon this occasion, that seems to effect the present question, is our Saviour's ready submission to what he was about to suffer, and his express refusal of defence by force. But this circumstance will be found to be of no importance; if instead of considering only the naked fact, we attend to the reason of his refusal. "Put up thy sword into its sheath. The cup, which my father hath given me, shall I not drink it? Thinkest thou, that I cannot now pray to my Father, and he shall presently give me more than twelve legions of angels? But how then shall the scriptures be fulfilled, that thus it must be?" He argues against the lawfulness of defending him by force, not from the general nature of the religion, which he taught, but from the particular appointment of providence, which had made it his special duty to submit to the injuries, that were coming upon him. Our Saviour's submission therefore, under the limitation, which arises from the reason of it, does not evince the necessity of a like submission, where there is not the same or a like reason. It will only teach us, that as far as the duty of our particular station or circumstances is attended with difficulties and hardships, whether they arise from the injustice of men or from any other cause, we are obliged as christians to go through that duty patiently, and are not at liberty to decline it or to endeavour by force to release ourselves from the outward necessity of performing it, upon account of those difficulties and hardships. Grotius falls in with the common notion, that St. Peter has extended this ex-



ample to christians in all stations and all circumstances whatsoever, and makes use of this apostle's authority as his second argument to shew, that however allowable it may be in cases of necessity to resist the supreme power in other instances; yet where we suffer for the religion of Christ, no necessity will justify resistance. For St. Peter having exhorted "servants to be subject to their masters, to the froward as well as to the gentle, and to take ill usage patiently, enforces his exhortation by observing, that they were hereunto called: because Christ also suffered for us, leaving us an example, that we should follow his steps; who, when he was reviled, did not revile again; when he suffered he threatened not, but committed himself to him, that judgeth righteously." We must allow, that a general rule of behaviour arises out of this example, and such a rule, as all christians are obliged to follow. The rule is what was just now stated at large: whatever hardships the duty of our station brings upon us, we must bear them patiently, and must not desert our duty for the sake of avoiding them. Now absolute submission is the natural duty of slaves; and to such as these the apostle's exhortation is here addressed. The occasion, which led him to press the performance of this duty, will shew us the great propriety of enforcing it by the example of Christ. We have already taken notice of a mistaken opinion, which then prevailed, that the gospel releases those, who embrace it, from all subjection whatsoever, and places them in a state of full liberty. St. Peter therefore, in opposition to this opinion, first commands servants to be subject to their masters, and then informs them, that they mistook the design of christianity: for though slavery is a state of hardships, yet the religion, which they had embraced, as they might learn from the example of its author,

was not designed to release them from the duty of their station upon account of any hardships, that attend the performance of it. I would not be understood to mean, that this example of Christ can be applied only to slaves, and that no others are obliged to follow it. The general rule, which arises from it, is applicable to all persons in every station; where the duty of their station is attended with hardships. But before it can be applied, as Grotius applies it, to prove, that we are not at liberty, as we are christians, to resist the unsocial injuries, which we suffer from our civil governours upon account of our religion; absolute submission to all the unsocial injuries, which they can bring upon us, must be shewn to be the duty of our station, as we are members of civil society. If such absolute submission is a duty, which naturally arises out of civil subjection, the example of Christ will shew us, that his religion does not discharge us from it. But if our station does not naturally require it of us, the religion of Christ does not enjoin it; whether we suffer unjustly by the unsocial oppression of our civil governours upon account of this religion, or upon any other account; and the example of Christ is out of the question.

Grotius in support of the doctrine of passive obedience and non-resistance, when we are persecuted for the religion of Christ, urges in the last place, that St. Peter exhorts us to rejoice, when we suffer as christians. But if this would prove any thing in the present question, it would prove too much. Grotius allows, that Christ has permitted us to save ourselves from persecution by flight: and yet, if the apostles exhortation to rejoice, when we suffer as christians, would prove, that the members of a civil society have not the same right to resist the unsocial injuries, which are done them upon account of their religion, that they

have to resist the like injuries, which are done them upon any other account, the same exhortation would prove, that they ought not to fly from persecution. For if rejoicing in sufferings is inconsistent with endeavouring to repel them; it is equally inconsistent with endeavouring to avoid them. But mankind are forced in fact to submit to many evils, which of right they might repel or avoid; if it was in their power: and christians, like other men, are exposed to such evils as these, sometimes upon other accounts, and sometimes upon account of their religion. When we are in these circumstances we have need of consolation: and the apostle gives us this consolation, if we are brought into them upon account of the religion of Christ, by assuring us, that such sufferings are matter of rejoicing; because they will be amply recompensed to us. If this is St. Peters meaning, his exhortation to rejoice, if we suffer as christians, does not determine any thing about the right of repelling or of avoiding persecution, it is only an encouragement to us to bear persecution well, and not to despair under it, when we cannot secure ourselves against it.

XV. In the general question concerning the right of resistance, it is usually objected, that there is no common judge, who is invested with authority to determine between the supreme governours and the people, where the right of resistance begins: and the want of such a judge is supposed to leave the people room to abuse this right: they may possibly pretend, that they are unjustly oppressed and upon this pretence may causelessly and rebelliously take up arms against their governours; though they are laid under no other restraints, and no other compulsion is made use of, but what the general nature of civil society or the particular circumstances of their own society require. But be this as it may; the possibility, that a right may be abused, does not prove, that no such right subsists.

Civil  
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right of  
resistance  
begins.



If we would conclude on the one hand, that the people have no right of resistance; because this right is capable of being abused; we might for the same reason conclude on the other hand, that supreme governours have no authority. Whatever authority these governours have in any civil society; it was given them for the common benefit of the society: and it is possible, that under the colour of this authority they may oppress the people in order to promote their own separate benefit.

When they, who make this objection have explained what they mean by an authorized judge, we shall be able to determine, whether there is any such judge or not, and how far the nature of civil government or of the right, that we are speaking of, will admit of one. If they mean a civil judge, who is invested, either by social union or by constitutional appointment, with authority to declare, when the grievances of the people will justify resistance; there neither is nor can be any such judge. For in the first place, the supposition, that the civil governours, from whom the grievances came, are invested with supreme power, makes the notion of such a judge a plain contradiction: because his office, as it would give him a civil power of controlling those governours, would imply, that he has a civil power superiour to the supreme. And secondly, the right itself cannot in its own nature be subject to the jurisdiction of a civil judge: because it is a natural and not a civil right: it is so much of the natural right of repelling injuries by force, as is exempted from civil subjection.

To this question.—Who shall be judge, whether the supreme governours act contrary to their trust? Mr. Lock replies, The people shall be judge. If he means, that the people have such a civil jurisdiction in this matter, as gives them, at least in the view of

civil society, a right of resistance, whenever they determine for themselves, that they have such a right; it will be difficult to support the truth of this reply. The supposition of such a jurisdiction is attended with the absurdity already mentioned: it implies a civil jurisdiction in the people, which is superiour to the supreme. Civil governours, who are invested with supreme power, are sometimes said to be accountable to God alone: and however exceptionable this rule may be, as it is commonly explained; we shall find it to have some truth in it; when it is explained, as it ought to be. No persons whatsoever, either separately or collectively, have any civil jurisdiction over such governours; and consequently they are not accountable to any human superiours as to civil judges. But in the mean time they are not at liberty to do what they please without any external control. Though they are not accountable to the people as to a civil superiour; yet the people, as far as they are not in subjection, have a natural right to repel the unfocial violence of such governours. In the same sense therefore, that supreme governours are accountable only to God, the people, however they may in other instances be accountable to their civil governours, are in the exercise of the right of resistance accountable only to God.

The people shall indeed be judge, when the supreme governours have acted contrary to their trust. But their right of judging is not founded in civil jurisdiction: it is such a right of judging, as all mankind were possessed of in a state of natural liberty. Mr. Lock compares the case of the people and of the supreme governours to the case of a private person, who appoints a trustee or deputy to act for his benefit, and asks, "Who shall be judge, whether his trustee or deputy acts well and according to the trust reposed in him, but he, who deposes him, and must by having

deputed him have still a power to discard him, when he fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned, and also, where the evil, if not prevented, is greater, and the redress very difficult, dear, and dangerous?" In order to see, whether this reasoning is applicable to the point in question, let us consider, what that point is. The supreme governours of a civil society have a right to direct and to compel the people, as far as the purposes of social union extend. It is an injury to these governours to resist them in the exercise of this right: and this injury is ranked amongst the worst of crimes, and is called rebellion. But where this right of the supreme governours ends; as it does where they exceed the limits of all civil power; the people have a right of resistance. The question then is, who shall judge, where the former right ends and the latter begins? Mr. Lock replies, that the people shall judge, in the same manner, and for the same reasons, that a private person, who has appointed a trustee or deputy to act for his benefit, is the judge, when his trustee or deputy has failed in the trust, and may discard him for having so failed. This indeed is certain, that where I have appointed any person to act for me; and he by this appointment acquires no right of his own, but only stands obliged to me to act according to my pleasure and for my sole benefit; I may discard him, whenever I think fit: and since, by the supposition, he has no right in the trust or no interest in it, which is properly his own; I shall do him no injury, though I discard him without any reason. But it is possible likewise, that my trustee or deputy, notwithstanding the appointment comes originally from me, may in consequence of this appointment acquire a right or interest of his own in the trust. Though this right should



be so connected with the trust, as to be forfeited, when the trust is broken; yet he cannot justly be removed at my pleasure: it would be an injury to discard him, when he had not broken the trust: because it would deprive him of a right which is his own. Indeed he holds this right conditionally: he loses it, whenever he breaks his trust. But I should injure him, if I was to put him out of the trust, before this event has happened. Upon this account, if he and I live in a state of civil society, the public will not suffer me to take the trust from him at my own discretion, but will judge by itself or its magistrates, whether he has so broken the trust, as to have forfeited the right, which goes along with it. If we live in a state of nature, where no common judge is provided; then indeed I must judge for myself: but he on the other hand has the same liberty to judge for himself: and if he is persuaded, that the trust has been faithfully discharged; he is not obliged to give up his right upon my sentence. I am a judge indeed; but I am not an authorized judge: I may determine upon the matter, but I can only determine for myself, and have no authority to determine for him. I may likewise act upon my own judgment: if I am persuaded, that he has forfeited the trust and with it the interest, which he had in it; I may endeavour to dispossess him by force: but he on the other hand may act upon his own judgment; and if he thinks, that he has not broken the trust, he may endeavour by force to defend himself in the possession of that right, which he has in the trust. Now though we should consider a supreme civil governour as a trustee for the benefit of the people, yet the trust is plainly of this latter sort. He has an interest of his own in the trust, or acquires a right of his own by being invested with it. The people therefore are not at liberty to discard him at pleasure; as they would be, if he was a trust-

tee for their sole benefit. Suppose him to incur a forfeiture whenever he breaks his trust; yet if the people deprive him of it under pretence, that he has broken it, when he has not, they injure him: because by depriving him of the trust, they deprive him of a right, which they gave him by appointing him to be their trustee. The question therefore is, who shall be judge between him and them, whether he has broken the trust? Civil society provides no authorized judge between these two parties. The people indeed shall judge: but they are not authorized judges: the supreme governour has the same right to judge, that they have, and is not bound to submit to their sentence. If they are persuaded, that he acts tyrannically; this persuasion may justify their resistance: but in the meantime if he is persuaded, that what he does is within the limits of civil power; this persuasion will equally justify him in supporting his own act. Both parties are naturally obliged to judge by the same rule: the arbitrary will of the supreme governour is not the measure of what he has a right to do; and the arbitrary will of the people is not the measure of their right of resistance. Whilst he acts within the natural limits of civil power, they have no right to resist him: and when he exceeds these limits he has no right to direct or to compel them. But each party has an equal right to judge, whether he has kept within those limits, or has exceeded them: and consequently neither of them are authorized judges in the case. Whether the supreme governing body consists of a single person, as in monarchies, or of a number of persons, as in other forms of government; if we were to consider it as a trustee or deputy for the people, that holds the trust or deputation precariously, and has no right conferred upon it by being appointed to this office; the people would then be authorized judges of the behaviour of this supreme body: nothing, which

they determined about its behaviour could be wrong : they might remove it from its office for every fault, or for every suspicion, or even without any fault or any suspicion at all. But the governing part of a civil society, whilst it is a trustee for the general benefit, is not a precarious trustee, that has no right of its own, and holds at the will of the part, which is governed. Its power is limited indeed by the purposes of social union ; so that the people are not in subjection to it, and may lawfully resist it, when it counteracts these purposes. But it has a right to this limited power, and cannot be justly deprived of it without cause, or be lawfully resisted in the exercise of it. Thus the nature of civil power does not give the people a full and absolute right to resist or to discard their supreme governours, whenever they please, or does not make them final judges by investing them with civil authority to determine, when resistance is lawful. Judges they are, but not civil or authorized judges. They judge in this case of their own right to resist and of the right of the supreme governours to compel, in the same manner only, that individuals judge of each others right in a state of nature ; where each party is at liberty to make use of his own force against others, for the support of what appears to him to be his own right : but those others are in the mean time as much at liberty to judge for themselves, as he is, and are likewise at liberty to make use of their force to oppose his demands, if force is necessary, and they are persuaded, that the demands are unjust.

In short, when the question is, whether the supreme governours of a civil society have abused their trust by counteracting the ends of social union ; the case is of such a sort, that no civil judge is or can be provided for it. But it does not follow from hence, that there is no judge at all : each of the parties are left to judge for themselves, as if they were still in a state of nature.



Both parties are accountable to God, if they judge wrongly and act upon this judgment: but neither of them is bound to submit to the judgment of the other.

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XVI. It is a groundless suggestion, that a right of resistance in the people will occasion treason and rebellion; or that it will weaken the authority of civil government, and will render the office of those, who are invested with it, precarious and unsafe, even though they administer it with the nicest prudence and with all due regard to the common benefit. The right of resistance will indeed render the general notion of rebellion less extensive in its application to particular facts. All use of force against such persons, as are invested with supreme power, would come under the notion of rebellion, if the people had no right of this sort: whereas, if they have such a right, the use of force to repel tyrannical and unsocial oppression, when it cannot be removed by any other means, must have some other name given to it. So that however true, it may be, that in consequence of this right of resistance supreme governours will be liable of right to some external checks, arising out of the law of nature, to which they would otherwise not be liable; yet it cannot properly be said to expose them to rebellion.

But the great stress of the present question is, not what name the use of force to repel unsocial and tyrannical oppression is to be called by, but what effect it will have upon the general security of those, who are appointed to govern a commonwealth, and upon the authority, which is necessary to be kept up, in order to enable them to discharge their trust with benefit to the public. Now the security of civil governours depends partly upon the consciences of their subjects, and partly upon the natural strength and influence, which they have in their hands. The ties of conscience procure them obedience and submission upon a principle of

duty: and the strength and influence, which goes along with their office, procure the like obedience and submission from such, as would disregard their duty, if it was not enforced by compulsion. They will have this latter security to guard their persons, and to support their authority, whether the people have a right of resistance or not. And in fact there is more danger of their making an undue use of their strength and influence, to support themselves, when they do wrong, than of their wanting a sufficient security against any attempts of faction, when they do right: it is more likely, that they should have it in their power to compel the people to submit to unsocial oppression; than that they should be in danger of being hurt by rebellion, under the pretence of a right of resistance. But this strength and influence is not their only security: for as long as they pay a due regard to the common good, the principle of conscience will procure them social obedience and submission, and will support their authority: because a right of resisting lawless power can never be a foundation in conscience for using force against just authority. In short upon whatever principles passive obedience and absolute subjection might be obtained, if the people had no right of resistance; upon the same principles social obedience and civil subjection may be obtained, though they have such a right. We cannot suppose supreme governours to have strength enough in their hands to enforce absolute subjection, and to secure them in the exercise of arbitrary power; without supposing them to have strength enough to enforce civil subjection and to secure them in the exercise of social power. And if a sense of duty would operate effectually to prevent the people from resisting their governours at all it will certainly operate as effectually to prevent them from resisting without a just cause.

## C H A P. IX.

## Of the law of nations.

- I. *How far the law of nations is a positive law.* II. *Nations are capable of an obligation by compact.* III. *In what sense prescription is a right of the law of nations.* IV. *No evidence of a positive law of nations to be collected from usage.* V. *Law of nations may be found by reason or by testimony.* VI. *Effects of the right of territory.* VII. *Questions about extent of territory belong to the law of nations.* VIII. *No right of territory in things, that do not admit of property.* IX. *Different sorts of war.* X. *Solemn war what, and why called just war.* XI. *Justifying causes of war.* XII. *A nation may be accountable for the act of one of its members.* XIII. *Members of a nation accountable for injuries done by it.* XIV. *One nation may lawfully assist another in war.* XV. *What is lawful in war.* XVI. *Property how acquired in war.* XVII. *What prevents prisoners of war from being slaves.* XVIII. *Effect of a declaration of war.* XIX. *Law of nations in respect of states, that are neutral in a war.* XX. *Privileges of ambassadors how far natural.* XXI. *Public compacts are either treaties or sponsions.* XXII. *Compacts between nations at peace or nations at war.* XXIII. *Equal and unequal compacts of nations.* XXIV. *Compacts of the same matter with the law of nature, or of different matter.*

How far the law of nations is a positive law. I. **I**N the general division of laws <sup>a</sup> I have followed Grotius, and have reckoned the law of nations amongst the positive laws of human institution. But though there is enough of positive institution in it to

<sup>a</sup> See B. I. C. I. § XI.



justify this division; yet there is reason to doubt, whether it is such a positive law, as he supposes it to be.

The law of nations, according to <sup>b</sup> his account of it, is a system or collection of rules which derives its authority from the positive consent of all or of most nations. He first considers the several nations or civil societies of the world as so many collective persons, who are formed into one great society including all mankind: and then he supposes the law of nations to be the dictate of the common understanding and will of this great body; in the same manner, as the civil law of each distinct civil society is the dictate of the common understanding and will of these smaller bodies.

If we were only to object here, that in the great society of all nations there is no common superiour invested with authority to prescribe laws; we should not take the matter up high enough. For in a society of equals, where there is no common superiour, who has authority over the whole, <sup>c</sup> the general body of the society taken together is superiour to each of the members taken separately, and has authority to prescribe laws to each. But this authority, in a society of equals, arises from their social union, that is, from the compact, by which they have bound themselves to act, for some common purpose, under the direction of the common understanding. And the want of such a voluntary union amongst the several nations of the world, is the reason, why there is in this great society no legislative power, or no authority to establish positive laws.

Some sort of union there is between all nations: they are all included in the collective idea of mankind, and are frequently spoken of under this general name. But this is not a social union: the several parts of this collective idea, whether we consider the great body of

<sup>b</sup> Grot. L. I. C. I. § XIV.

<sup>c</sup> See B. II. C. VI. § I.

mankind as made up of individuals or of nations, are not connected, as the several parts of a civil society are, by compact among themselves: the connection is merely notional, and is only made by the mind for its own convenience.

Nature has likewise made such a connection between all mankind, as obliges them to obtain from what is productive of harm to one another, and to do what is productive of mutual good. But this connection, whilst it is the foundation of the law of nature, cannot without the intervention of some social compact be the foundation of any positive law. we find, that all mankind, when we consider them as individuals, are obliged by their condition and circumstances to do good and to do no harm; but this obligation does not give them any power to prescribe laws to one another; till they have agreed to unite themselves into societies. In like manner all nations, when we consider them as so many collective persons, are obliged to observe the same law of nature. But this obligation gives them no positive legislative power over one another: it does not give any one nation, or any number of nations, authority to bind the rest either to do any thing, which the law of nature has not enjoined, or to avoid any thing, which this law has not forbidden.

But though, for want of a social union, and consequently of a legislative power, amongst the several nations of the world, there cannot be any such positive law of nations, as Grotius has imagined; yet the law of nations may be distinguished from the law of nature; and the foundation of this distinction is laid in general agreement and positive institution. A number of individuals, who have formed themselves by mutual compact into one body, under an obligation of acting by the direction of the common understanding for some certain purposes, are bound to consider them-

selves, in respect of these purposes, as one moral person. But the rest of mankind, as they are not parties in this compact, are under no natural obligation to take notice of it, and are still at liberty to consider and to treat the society as a large company of unconnected and individual persons. Since therefore in the mutual intercourse of mankind civil societies are universally considered and treated by one another, as collective moral persons; and the several members of such societies are considered and treated, not merely as separate individuals, but as parts of these collective persons; this personality, which is thus given to civil societies, must be derived from some universal consent or agreement of all nations. We see something like this within a civil society; when some of its members have by compact associated themselves for a private purpose of their own. This compact obliges them to act together, and to consider themselves, in reference to this purpose, as one collective body or one moral person. But the civil community, to which they belong, considers them still as so many distinct individuals. For however the civil law, in the case of partnerships, may support the particular claim, which the private compact, that is between them, gives the several partners either upon the common stock or upon one another; yet it does not treat the associated body as one moral person. Such a body cannot receive a legacy, and cannot sue or be sued, in a corporate capacity: it has not this sort of personality in the view of the society; till it has been incorporated by some public act. In like manner a civil community within the great body of mankind, however the members of it may be connected amongst themselves by a social compact, is only a large company of unconnected individuals in respect of all others, who are not parties to this com-



paſt ; till mankind by a general or public aſt have agreed to conſider it as a moral perſon.

This general aſt of conſent is the foundation of the law of nations, as far as this law differs from the law of nature. The matter of both theſe laws is the ſame : the law of nations, as well as the law of nature, commands whatever is beneficial, and forbids whatever is hurtful to mankind in general. But whilſt the matter of them is the ſame, the objects of them are different : the law of nature conſiders mankind as individual perſons ; the law of nations conſiders them as formed into collective perſons. Thus the ſame law, which is called the law of nature, when it is applied to ſeparate and unconnected individuals, is called the law of nations, when it is applied to the collective bodies of civil ſocieties conſidered as moral agents, or to the ſeveral members of civil ſocieties conſidered, not as diſtinct agents, but as parts of theſe collective bodies.

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paſt.

II. The law of nature, in this application of it, is not the only meaſure of the obligations, that nations may be under towards one another. When they are conſidered as moral agents, they become capable, as individuals are, of binding themſelves to one another by particular compaſts, or treaties, to do or to avoid what the law of nature has neither commanded nor forbidden. But theſe obligations, which thus differ in their matter from the law of nature, neither ariſe from a poſitive law of nations, nor produce ſuch a law. They ariſe from immediate and direct conſent, and extend no farther than to thoſe nations, that by their own aſt of immediate and direct conſent have made themſelves parties to them.

In what  
ſenſe pre-  
ſcription  
is a right  
of the law  
of nations.

III. In ſpeaking of the right of preſcription <sup>d</sup> I had occaſion to obſerve, that the natural foundation of it is only conjectural, and that the right itſelf would have been precarious and uncertain, if it had not been

<sup>d</sup> See B. I. C. VIII. § VII.

established by the general consent of mankind. But this right notwithstanding it is thus established, will afford us no evidence, that there is a positive law of nations, which is distinct from the law of nature applied to civil societies, as if they were moral agents. For the notion of such a law of nations not only supposes, that it introduces and establishes rights, which have no foundation or no certain foundation in nature, but likewise that it regards mankind only as they are formed into civil societies. Whereas the general consent, which establishes the right of prescription, though by ascertaining this right it produces an effect, which the law of nature without its assistance would not have produced, regards mankind equally, whether we consider them as formed into civil societies or as subsisting independently in a state of nature. And if the right of prescription would take place amongst individuals in a state of nature, we cannot with any propriety call the general consent, which establishes it, a positive law of nations: because the notion of a law of nations, which will subsist alike, whether any nations subsist or not, is unintelligible. The general consent, which establishes the right of prescription, is so far from being a positive law of nations, that it is no law at all. It is a positive act of all mankind: but this positive act is a compact and not a law. All are bound by it; not because it is done by any legislative authority; but because all and each have either expressly or tacitly made themselves parties to it by their own immediate and direct concurrence. If this common act of mankind was a law; it could operate only in consequence of some sort of social union, by which they, who do not immediately and directly consent to it, are understood to consent to it remotely and indirectly. But the right of prescription, as it is established by general

consent, takes place amongst independent individuals, who are in a state of nature, where there is no sort of social union, and consequently where no law can be made, and no common act can be done any otherwise than by compact.

The establishment of prescription is like the introduction of particular property. Nature did not appropriate any goods, either moveable or immoveable, to particular persons by dividing the common stock and assigning to each person his particular share. The claim of property was introduced by a positive act of general consent. But this act of consent is not a positive law of nations. For since the right of property, which is the effect of it, takes place amongst unconnected and independent individuals, it can be no law. And if it was a law, it could not be called a law of nations with any propriety, both because it does not presuppose mankind to be united into nations, and likewise because nations are not the peculiar objects of it.

A fixed and steady right of prescription, as it is thus established by a general compact of mankind in a state of nature, is in the first instance an adventitious right of the law of nature. But after mankind have formed themselves into civil societies, and have agreed to consider these societies as moral agents or collective persons, it then becomes a right, not only of the law of nature, but likewise of the law of nations; not because it was either established at first, or is supported now, by any positive law of nations; but because amongst independent individuals it is a right of the law of nature; and the law of nations is nothing else but the law of nature applied to the collective persons of civil societies, as if they, like individuals, were moral agents.



IV. We may reasonably conclude, that there is no law of nations, which is wholly positive, if such a law is no where to be found: for a law, that does not appear, is in effect a law, that does not exist. \* Grotius allows, that a purely positive law of nations cannot be traced out, as the law of nature may, from principles of reason. It is not derived from the constitution of things and the circumstances of mankind, but from the will and appointment of the legislators: and when we are to enquire, what their will and appointment is, in respect of such things as are indifferent in themselves; this is a question of fact and not of reason. In civil laws, if they are written ones, authentic evidence of the will of the legislator is to be had: the law appears in the original record, and in such copies of this record, as are well attested. But such a law of nations as Grotius contends for, is an unwritten one: there is no original record of it, and no copy of any such record. He therefore directs us, in searching for it, to have recourse to the same means, that are made use of in searching for unwritten civil law, to usage or custom, to conjectures, and to the judgement and testimony of skilful persons.

No evidence of a positive law of nations to be collected from usage.

Now the usage, in which unwritten civil laws appear, is mere usage, and consists in immemorial and uninterrupted practice. But if we look into the practice of nations, as it is related in history, it does not appear in any instance to have been constant and uniform; that is, no usage appears, from whence we can collect what the positive law of nations is. Grotius was aware of this: and though he sets out with recommending history as a principle help for discovering the law of nations, yet he afterwards confesses, that this help, if we have no other, will be of little service: for since it is the business of history to record all facts indiscriminately, we must necessarily find in it not only

\* L. II. C. XVIII. § IV.

L. I. C. I. § XIV.

such practices of mankind, as are right and proper, but such likewise, as are wrong and contrary to law. When this help fails us, as it always will, he directs us to have recourse to conjectures. But if the practice of nations has been variable and contradictory, all conjectures will be nothing to the purposes: they can never make an usage out of a variable and contradictory practice; and usage is the only proper evidence of an unwritten law, which is wholly positive. It will be as little to the purpose, when we ask, where we may find this positive and unwritten law of nations, to tell us, that we may learn it from the judgment and testimony of skilful persons. This is no satisfactory answer to the question; it is only a change of the persons, about whom the question is asked. We ask in the first instance, where we ourselves may find the law? and if we are only told, that we may learn it from the judgment and testimony of skilful persons, we may still go on to ask, Where do they find it? Their skill cannot discover any usage of nations; where the practice, as history relates it, is variable and contradictory. Their judgment cannot lead them to the knowledge of the law; where the law is wholly positive, and cannot be deduced by the help of reason from natural principles. And their testimony will prove nothing; where the law is an unwritten one, and consequently they can have no record of it before them.

Law of  
nations  
may be  
found by  
reason or  
by testi-  
mony.

V. But if the law of nations, instead of being purely positive, is only the law of nature applied, in consequence of a positive agreement amongst mankind, to the collective bodies of civil societies as to moral agents, and to the several members of such societies as to parts of these bodies; the dictates of this law may be found by the same means, that we make use of in searching for the dictates of the general law of nature.

In laws, which are purely positive, there is no arguing from reason to law. We may think, that many things ought in reason to be established by law; whilst the legislator has not established them in fact, and saw no reason, why he should establish them: and on the contrary he may have established many things in fact, and for weighty reasons; where we are not aware of any reason at all. But the law of nations is positive only in the manner of applying it, and is natural as to its matter: it is the law of nature applied by positive consent to the artificial persons of civil societies: and consequently the dictates of it are only the dictates of right reason, and may be collected by arguing from the nature of things, and from the condition and circumstances of mankind, when they are considered as formed into such societies.

The history of what has passed from time to time, amongst the several nations of the world, may likewise be of some use in this enquiry: not because any constant and uninterrupted practice in matters, which are indifferent by the law of nature, is to be collected from thence; but because we shall there find what has been generally approved, and what has been generally condemned, in the variable and contradictory practice of nations. If the law of nations is founded upon natural principles, and is not merely a positive law, which has no other foundation, besides the will of the legislators; the approved practice of mankind will help to inform us what its dictates are. There are two ways, says <sup>f</sup> Grotius, of investigating the law of nature: we find out this law either by arguing from the nature and circumstances of mankind, or by observing what has been generally approved by all nations, or however by all civilized nations. The former is the more certain of

<sup>f</sup> L. I. C. I. § XII.



the two: but the latter will lead us, if not with the same certainty, yet with a high degree of probability, to the knowledge of this law. For such an universal approbation must arise from some universal principle: and this principle can be nothing else but the common sense or reason of mankind. Since therefore the general law of nature may be investigated in this manner, the same law, as it is applied particularly to nations as to moral agents, and is called the law of nations, may be investigated in the same manner.

From hence we may see what use is to be made of the judgment and testimony of skilful persons, in these enquiries. Their judgment will help to point out the law of nations: because what is approved of by men of prudence, and honesty, and experience, is more likely to be conformable to the dictates of right reason; than what is approved of only by the vulgar, and unthinking, and dissolute. And their testimony will be of weight, as it will be an evidence not only of their own sentiments, but likewise of what they have found upon diligent enquiry to be the general sentiments of the civilized part of mankind.

It may be necessary here to caution the reader against imagining, that a law of nations, which is purely positive might be established, if not by the constant and uninterrupted practice, yet by the approved practice of nations. For no practice, which is indifferent in itself, and is neither commanded nor forbidden by the law of nature, can be approved for any other reason, than because it is conformable to some positive law. The notion therefore of an approved practice of nations, where the law of nature is silent, must necessarily presuppose the existence of a purely positive law of nations: and approved practice, if it presupposes this law, cannot be the cause of it. If there is any such law; it must have been introduced and established by mere usage,

which consists in uniform and uninterrupted practice : but we have already observed what our author confesses, that in the dealings and intercourse of nations with one another, as history relates it, no such usage is to be found.

As we have now seen what the law of nations is, and where this law is to be found ; there will be no occasion to detain the reader with a particular examination of the several cases, that may arise, in the intercourse of nations with one another. If he understands what the law of nature is, when it is applied to individual persons in a state of equality, he will seldom be at a loss to judge what it is, when he is to apply it to nations considered as collective persons in a like state of equality. But we may perhaps be misled in our judgment for want of observing, that in the intercourse of nations sometimes the civil law of each nation, and sometimes the general law of nature, which considers the several members of a civil society, not as parts of a collective person, but as so many individual persons, is the proper measure of what is right and what is wrong. It may therefore be necessary to consider such of the leading cases, as will help to point out the distinct provinces of these several laws.

VI. A nation <sup>Effects of</sup> by settling upon any tract of land, which at the time of such settlement had no other owner <sup>the right</sup> acquires, in respect of all other nations, an exclusive right <sup>of terri-</sup> of full or absolute property not only in the land, but in the waters likewise, that are included within the land, such as rivers, pools, creeks, or bays. This absolute property of a nation, in what it has thus seized upon, is its right of territory.

When I say, that a nation's right of territory consists in the absolute ownership of the land, where it has settled, or of such waters, as are an appendage to the land ; I mean its right of territory, as far as other nations, or the members of other nations are

affected by this right. For in respect of its own members, its right of territory consists, not in an absolute, but in a paramount, property. Occupancy in the gross gave the nation from the first a right of absolute property in the land, where it settled. But a subsequent distribution and assignment, or a subsequent occupancy in parcels, gives the several members of the nation private property in their respective shares. This private property, which they acquire by the assignment of the public, or by their own particular occupancy with the leave of the public, though it implies a right to use what is thus acquired, and to dispose of it, is not strictly a right of full property or absolute ownership. It is property; because it is an exclusive right, in respect of all other individuals, to use the land, and to dispose of it: but it is not full or absolute property in the strictest sense; because the public has a right to limit and to direct the use and disposal in such a manner, as the common safety and welfare require. This right of the nation is a sort of property: it is an exclusive right in respect of all other persons whatsoever, whether individual or collective, to direct the use and the disposal of the land for the purposes of social union. And this sort of property, as it is thus distinguished from private ownership, is what our author calls paramount property. But after the lands, which the nation has acquired, are thus distributed amongst the several members of it, and are held by them in private ownership, so that nothing besides paramount property remains to the public in respect of its own members; the nation, considered as one collective person, has still in respect of all other nations, and of all other individuals, an exclusive right of full property in the whole tract of land: not only because what passes within the nation, the manner, in which it parcels out the country,



where it settles, amongst its own members, and the terms, upon which they hold their several shares, does not fall under the notice of foreigners; but likewise because, when all the members of the society are considered as one collective person, the whole property of the land, as well what has been granted by the public to its several parts, as what remains in the public itself, is vested in this collective person.

In consequence of this exclusive right of property, which a nation has in its own territories, the law of nations is not the only measure of what is right or wrong in the intercourse of nations with one another. This right of territory extends the authority of civil law to all questions, which relate to the use or the private ownership of such moveable goods, as are within the territory of the nation, and of such immoveable goods, as are confessedly a part of its territory; whether its own members only are concerned in these questions, or the collective bodies or the individual members of other nations. Thus every state has authority to determine by positive laws, upon what occasions, for what purposes, and in what numbers, foreigners shall be allowed to come within its territories, to exclude them from trading there at all, or to regulate their trade, to leave them under their natural incapacity of inheriting immoveable goods or to remove this incapacity, to prevent them from inheriting moveable goods, or to prescribe the conditions, upon which they may inherit.

Civil laws, when they causelessly and unreasonably exclude foreigners either from coming into the territories at all or from trading there, are inhospitable. But these inhospitable civil laws are no otherwise contrary to the law of nations, than as this law, like the general law of nature, enjoins the duties of humanity

and benevolence. Every nation has by the law of nations, as every individual has by the law of nature, a right to judge for itself, how far its intercourse either of the commercial or of the friendly sort is likely to be detrimental to itself. So that to cut off either or both sorts of intercourse will be no act of injustice; though it will be wrong, if it is done causelessly. A nation has a moral power to withhold its benevolence; and they, from whom it is withheld unreasonably, though they are not treated kindly, are not injured.

Inhospitality amongst nations is less usual now, than it was in early times. Indeed every nation might rather be said to use a prudent and necessary caution for its own security, than to be guilty of a breach of hospitality, by excluding foreigners from coming into its territories; when upon account of the frequent practice of piracy and robbery there was such a strong presumption, that all strangers came for these purposes, as made it no incivility to ask strangers, whether they were not free-booters, and to call them, in the common way of speaking of them, by the name of enemies. <sup>h</sup> Cicero gives a different turn to this kind of language. He remarks that such a person, as should properly be called *perduellis*, or an enemy, was in the early times of Rome called *hostis*, which appears from the XII tables to signify a stranger. This, he says, was a tenderness of expression: an enemy was called by the milder name of a stranger with a design to abate the odiousness of the character. But <sup>i</sup> Grotius seems to have given a juster account of the matter, when he considers this rather as a harshness of expression towards strangers, than as a tenderness of expression towards enemies. An enemy in the old language of Rome was called a stranger, not because they, who used this language, intended to compliment

<sup>h</sup> De Offic. L. I. C. XII.    <sup>i</sup> L. II. C. VII. § XIV. C. XV. § V.

their enemies with the tender name of strangers; but because in those early ages they considered every stranger as an enemy.

Though the civil laws of every nation are the proper measure of the right, which foreigners have to make use of its territories, for any purpose whatsoever; yet these laws, like all others, admit and require the equitable exception of necessity. If the civil laws have forbidden any particular foreigners to come within the territory, or to bring any particular goods into any of its ports, or to come into any of them with a ship of force, under a certain penalty; foreigners, who stray thither by land, or whose ships are driven into the ports by stress of weather, may by the letter of the law be subjected to the penalty, but the equitable rules of interpretation will exempt them from it.

In consequence of the property, which every nation has in its own territories, the rights of harmless profit amongst nations are of the same sort, and are under the same limitations, with the like rights amongst individuals in a state of nature. They are rights, which may be maintained in theory; but the nature of them renders them precarious in their exercise. This matter has been explained already in its proper place. But we may add here, that though a passage for the goods of merchants or traders through the territories of a nation, either over the land, or upon the rivers, or upon such arms of the sea, as are appropriated, is commonly reckoned amongst the claims of harmless profit; yet it is consistent with the law of nations to demand some toll or other acknowledgement for such passage. Grotius allows, that all payments of this sort are just, as far as they have any relation to the safety of the goods or other benefit of the trader. If a nation upon account of such a passage is at expence in keeping up

<sup>k</sup> See B. I. C. V. § VIII, IX.



a road by land, or in repairing locks and sluices for the convenience of navigation, or in maintaining light-houses upon the coasts, or in guarding the traders by an armed force against pirates or other robbers; so much may undoubtedly be required of foreigners in their passage, as will repay these or the like expences. But the nature of all rights of harmless profit will lead us one step farther: for since bare passage through the territories of a nation, though it should occasion none of these expences, cannot be claimed without the consent of the nation; if it is in any degree probable, that the nation by granting such passage will lose an advantage which it might have made for itself; there is no injustice in demanding toll upon this consideration.

Questions  
about ex-  
tent of  
territory  
belong to  
the law of  
nations.

VII. Where a question arises between two nations about the extent of their respective territories, that is, about their respective right to this or that tract of land; the civil law of either nation cannot be the proper measure, by which the controversy is to be determined. The general property of a nation in its own territory, as it is an exclusive right to a certain tract of land, implies a right to prescribe to all others, whether they are nations or individuals, the conditions, upon which they shall be allowed to make use of this tract of land, or take part of it in private ownership, By this accident the authority of the civil law of the nation is extended beyond its own members: and if foreigners want to use or to acquire in private property what belongs to the nation, they must submit to use or to acquire it upon such terms as the nation will agree to. But when the question is about the right of territory itself, whether such a particular tract of land is included in the general property of the nation or not; the civil law of the nation has no authority in this question. The authority of the civil law can extend no

farther than the nation's jurisdiction. But as it has no direct jurisdiction over the person of the other party in the dispute, that is, over the collective body of the other nation; so neither has it any indirect jurisdiction over this other party, by having a direct jurisdiction over the thing in question; because the question is, whether it has any such direct jurisdiction over the thing or not.

In a state of natural equality a controversy between two individual persons, about the extent of their respective property, must be decided by the law of nature. In like manner the law of nations is the rule for deciding a like controversy, where the contending parties are two nations, and the matter in question is the extent of their respective territories or general property. But since the law of nations is only the law of nature applied to the collective persons of civil societies, and these collective persons are, in respect of one another, in a state of natural equality; if we know, what the law of nature would determine in any case between individuals, the law of nations will in like circumstances determine in the same manner between civil societies.

Express compacts, by which two nations have settled the bounds of their respective territories, are binding upon the nations, and will ascertain their respective claims. For want of such express compacts recourse must be had to usage, which is a tacit compact. The mere cultivation, or other use, of the land by the members of one of the nations will prove occupancy: but if the land, which is thus seized, was at the time of seizing it a part of the territory of the other nation; such cultivation does not prove property. All occupancy gives possession; but in order to produce property, either general or particular, it must be

the occupancy of a thing, which at the time of seizing it had no owner. But if the land, which is in dispute, has been cultivated, or otherwise used exclusively, from time immemorial by the members of one of the nations without any interruption at all, or without any but what has been withdrawn as wrongful; this is an evidence, either that this land was included in the occupancy, which the nation made at its first settlement, and so was a part of its original territory, or else that it was acquired afterwards by mutual agreement. A claim likewise may have been kept up, without any cultivation or use of the land, by including it from time to time, when the nation has made perambulations to ascertain the boundaries of its territories, or by setting up standing land-marks, or by notice to all persons, who have come thither for the purpose of settling upon it, to withdraw. But if the land has not been cultivated, or otherwise used exclusively, and no claim has been kept up by these means or by others of the same sort; it is a part of the common stock of all mankind: so that either of the contending nations may appropriate it by occupancy; and the nation, which seizes it first, will have a right of territory in it.

<sup>1</sup> If a river at the confines of the territories of two nations changes its course, and any question arises between the nations, whether a change is made in the extent of their respective territories, so that their jurisdiction extends to the river, as it did before; this is to be determined in the same manner and upon the same principles, as if a river at the confines of the two estates of two individuals, who are in a state of nature, had changed its course, and a like controversy had arisen between these two private owners.

The principles, upon which Grotius argues in this question, are founded in the different sorts of limits,



that are made use of to divide and set out lands. A parcel of land may be set out either by measure, or by such limits, as are apparent to sense : and these limits, which are apparent to sense, may either be artificial or natural. In the suburbs of the cities of the Levites we have an instance of possessions, which were limited by measure. Moses commanded, that these suburbs should reach from the wall of the city a thousand cubits round about. The lands of private persons are sometimes distinguished by artificial limits, such as walls, or rails, or ditches, or hedges. Territories are likewise distinguished by limits of the same sort, such as pillars, or mounds of earth. And either private estates or territories may be set out by natural limits, such as mountains, brooks, or rivers. If these are the only ways, by which the lands of different owners can be bounded and separated ; it is not worth the while to enquire with some of the commentators upon Grotius, whether he has explained and applied the several technical terms made use of by those, who have professedly written about the boundaries of lands, in the same manner and in the same precise sense, in which these writers explain and apply them.

If lands, whether they are in the general property of nations, or in the particular property of individuals, are set out by measure ; no change is made in the boundaries either of two private estates or of two territories, though a river, which runs at the confines of them, should happen to change its course. Each party has a right to a certain quantity of land estimated by measure : and this measure is the proper limit of each party's claim. The river is not the limit ; it only happened, that this river ran at the limit, or where the respective measures ended. And certainly no change can be made in the extent either of private property, or of territory by a change in what was not the limit of them.

In like manner if the lands were fet out and distinguished from one another, by some artificial mark ; though a river, which once washed this mark, should change its course and run within it on one side, such a change does not enlarge the extent of private property or of territory on one side, or diminish it on the other : because the extent of such private property or of such territory cannot be changed upon account of a change, which is made in something, that was not designed to be the boundary of them : and here the artificial land-mark, and not the river, was designed to be the boundary : it was merely accidental, that the river ever ran close to the land-mark.

But in lands, which have no other limit, besides a river, and were designed to have no other, Grotius distinguishes between a change made in the course of this river by imperceptible degrees and a change made all at once. Whilst a change is making by imperceptible degrees, the river at any one instance of time is the same, as to sense, that it was in the next preceding or will be in the next subsequent instant. In like manner it will be considered all along as the same river, and consequently as the proper limit between the lands, that are on each side of it. But as long as the river is the same, the private property or the territories of the two parties on each side of it, will extend as far as the river, and no farther ; though by this imperceptible change the extent is enlarged on the one side and diminished on the other. The change may at last become perceptible : but such a change does not make the river different ; because it has all along been considered as the same. Whereas if the river leaves its old channel all at once, and breaks out in a new one ; such a change is perceived immediately ; and the river no longer reckon-

ed the same, that it was before. For a river is not merely a stream of water coming from a spring, but such a stream running in a channel. The sameness therefore of the river cannot be preserved, in the account of mankind, unless all the parts of this definition continue the same as to sense; that is, unless the channel, as well as the spring, continues the same. And however the old river might be the limit of property or of jurisdiction on each side; the new river is not the limit; unless the parties, who claim property or jurisdiction on each side, agree to make it so. In the mean time their claims will extend just as far as they did before this change; that is, to the old bed of the river.

In applying these principles it will be necessary to know, whether the lands in question have any other boundary, or whether they were originally designed to be set out by the river; when the river changes its course by imperceptible degrees. For in this case, the extent of private ownership or of territory will be changed; if the river was the proper boundary of the lands. Whereas if they were set out by measure or by artificial marks, such a change in the course of the river makes no change in the extent of private ownership or of territory. The general rule here is, that if no evidence can be found of any other limit, we may reasonably presume, that the river was intended to be the limit: because it is most likely, where nothing appears to the contrary, that either individuals or nations would chuse to have such a limit of their estates or of their territories, as will be a natural fence to them and may be had without any trouble.

VIII. After Grotius had spoken of occupancy as the means of acquiring either jurisdiction or property; he goes on to divide jurisdiction into two sorts, a jurisdiction over persons and a jurisdiction over things.

No right of territory in things, that do not admit of property.



But his readers should observe, that occupancy is not the origin of both sorts of jurisdiction. No act of occupancy will produce a jurisdiction over persons: this can be produced no otherwise than <sup>n</sup> by generation, or by consent, or by a crime. The only jurisdiction therefore, that is acquired by occupancy, is over things. And though Grotius has here occasionally mentioned both sorts of jurisdiction, we have no reason to suppose, that he considered occupancy as the means of acquiring both; not only because he elsewhere teaches us, that a right over persons is to be acquired by other means; but because, when he here speaks of occupancy as the origin not only of property but likewise of jurisdiction, he seems to confine the jurisdiction, which arises from thence, to things only, by saying, that occupancy produces jurisdiction over such things, as are not yet appropriated.

But be this as it will; if occupancy is the origin of jurisdiction over things; the consequence will be, that no jurisdiction can be acquired over such things, as are not capable of being appropriated. For the reason, why some things do not in the nature of them admit of property, is, because they do not admit of occupancy: and where no occupancy can be made, no jurisdiction can be acquired. Thus rivers, or bays, or straits, which are capable of being appropriated by individuals, may likewise be part of the territories of a nation. But as no individual can acquire property in the main ocean, either in whole or in part, so the ocean cannot be within the jurisdiction, or belong to the territory of any nation.

Whilst <sup>o</sup> Grotius considers occupancy as the origin of jurisdiction, it is remarkable to find him contending, that though the main ocean cannot in whole or in part be the property either of an individual or of a nation,

<sup>n</sup> Sec B I. C. X. § III. C. XI. § I.

<sup>o</sup> L. II. C. III. § III. C. II. § III

yet it will admit of jurisdiction. His distinction between property and jurisdiction, if there was any real foundation for it, would not clear up this matter. For whatever difference there may be between them, they have the same origin. And if the nature of the ocean excludes property, because it will not admit of occupancy; it will for the same reason exclude jurisdiction. But in fact there is no other real difference between property and jurisdiction, than that the former is either private ownership, which is vested in an individual, or the full ownership, which a nation acquires by occupancy in the gross, and the latter is the paramount property, which continues to be vested in a nation, after private ownership is granted to its several members. In common language property in things signifies the private ownership of them; whilst the paramount property in them is expressed by the peculiar name of jurisdiction. But this is only a difference of words: both ownership and jurisdiction have the nature of property; for both of them consist in an exclusive right over things in some respect or other. <sup>p</sup> Grotius, in support of a distinction between property and jurisdiction, alledges, that the property of land may pass to an alien, who lives in a foreign country, but in the mean time the society, in the territories of which the land is, will retain its jurisdiction: and they must needs be different rights, which can thus be separated from one another. I shall not call the possibility of the fact, which is here supposed, into question: because though an alien is <sup>q</sup> naturally incapable of inheriting land, he may be made capable by civil laws. I likewise allow, that in the case, which is here supposed, the property of the land would pass to the alien, and the jurisdiction would remain where it was before.

<sup>p</sup> L. II. C. III. § IV.

<sup>q</sup> See B. I. C. VI. § VI.

From hence it will certainly follow, that jurisdiction is not the same right with what in common language is called property. But it will be no consequence, that jurisdiction is not any sort of property. I do not suppose it to be the same sort of property with private ownership: if it is paramount property, it is such a right, as can only be acquired by occupancy either mediately or immediately, and as those things, which in their own nature are incapable of being appropriated by occupancy, cannot admit of.

We may go one step farther. Whatever does not admit of full property or absolute ownership, cannot be a part of the territory or under the jurisdiction of a nation: because all jurisdiction or right of territory presupposes full property or absolute ownership. The first acquisition, that a nation makes, when it settles upon any tract of land, which was before in common to all mankind, is the ownership of the land. Its jurisdiction, as far as it can be distinguished from ownership, is the paramount property in the land, or a right to direct the use and disposal of it for the general benefit and security of the nation, after the ownership has been granted by the public body to the several members. But this is not all. Whatever distinction there may be within a nation between jurisdiction and ownership; there is no such distinction in respect of other nations. The jurisdiction of a civil society over its own territories is, in respect of its members, a paramount property to direct the use and disposal of such things, as are parts of the territory, to the purposes of social union. But in respect of other civil societies, jurisdiction or right of territory is a right of absolute ownership, or a full right to exclude them from having any thing at all to do with the territory.

There is another way, in which a nation may acquire jurisdiction or a right of territory, without ac-



quiring the absolute ownership of the land in the first instance by occupancy in the gross. But this way like the other presupposes absolute ownership to have been acquired, though not by the nation as one body, yet by the several members of it, as independent individuals, before the right of territory could take place. If a number of individuals, whose lands are contiguous to one another, unite themselves into a civil society; this act of union in the first instance gives the society only a jurisdiction over their persons. But a paramount property or jurisdiction over their lands, is a necessary effect of this jurisdiction over their persons: because the public by the act of social union acquires a right to direct them, as in other particulars, so likewise in the use and disposal of their land, in such a manner and by such rules, as the general welfare and security shall make necessary. The territories of nations were probably small at first, and encreased by degrees, till they arrived at the size, of which we now find them. And in what way soever any nation made its first acquisition, the extent of its territories has undoubtedly in many instances been encreased, not only by seizing upon other land, which was near to the place of its first settlement and had no owners, but likewise where the land had owners, by incorporating those owners into its body. But as far as the right, which the owners had in their lands, fell short of full or absolute property, so far the nation, which acquires jurisdiction over their persons by their civil union with it, would fall short of acquiring a full right of territory, or full jurisdiction, over their lands. When any civil society has received an alien as a members by incorporating him into its body; the society, which by thus receiving him acquires jurisdiction over his person, will not acquire jurisdiction over any lands, which belong

to him in the territory of his native country. And the reason, why one of these jurisdictions does not here follow the other, is, because his property in the land was not full and absolute: his native country had a right of territory or a paramount property in it, by which his ownership was limited. <sup>s</sup> Grotius might perhaps have a view to this method of acquiring jurisdiction over land, in consequence of a jurisdiction acquired over the person of the owner, when he speaks of persons as the primary objects of jurisdiction, and of a territory as the secondary object of it. In the other method of acquiring jurisdiction over land, where a nation, after it is formed, settles upon a void tract of country, and by this act of settling upon it, which is an act of occupancy, acquires a right of territory or jurisdiction over it; the persons, of which the nation consists, may be called the first objects, and the territory may be called the second object of jurisdiction; because they succeeded to one another in this order of time. But since the jurisdiction over the territory does not in this case arise consequentially out of the jurisdiction over the persons, without the intervention of any other act; one of them cannot properly be called a primary and the other a secondary jurisdiction. But whatever might here be our author's meaning; it is evident, that where a jurisdiction over things arises consequentially out of a jurisdiction over persons, the things, over which such jurisdiction is acquired, must at the time of acquiring it be the property of those persons. And from hence it follows, that such things, as are in their own nature incapable of being appropriated, cannot in this way be brought under the jurisdiction of a nation, or become a part of its territory.

<sup>t</sup> Grotius does not extend the jurisdiction, which he supposes, that a nation may possibly have over the

<sup>s</sup> L. II. C. III. § XIII.

<sup>t</sup> Ibid.

ocean, to the whole ocean, but only to some parts of it. This partial jurisdiction he explains to be a jurisdiction either in respect of persons, when a nation has a fleet, which is a maritime army, stationed in any part of the ocean, or in respect of territory, as far as a nation can from the shore command and restrain those, who are upon that part of the ocean, which is next to the shore, as effectually, as if they were upon the land.

There can be no doubt about the jurisdiction of a nation over the persons, which compose its fleet, when they are out at sea; whether they are sailing upon it, or are stationed in any particular part of it. But when they are thus stationed; this jurisdiction of the nation is merely a jurisdiction over their persons, and not over that part of the ocean, where those persons are. We may say, if we please, that the nation has jurisdiction in that part of the ocean; because the persons, over whom it has jurisdiction, are there. But we cannot say with any sort of propriety, that it has jurisdiction over the ocean itself: because as the persons, who are under its jurisdiction, have no property in the ocean merely by being upon it; the jurisdiction of the nation over the persons, who are there, will give it no jurisdiction over the ocean. If a land-army was passing through an uninhabited country, the nation, to which the army belongs, would have jurisdiction in that country: because the persons, who are the objects of its jurisdiction, are in that place. But in the mean time, if the army acquired no property in the country, the nation would have no jurisdiction over the land, where the army happens to be; that is, the land itself, merely by the armies being there, would not become the object of the nations jurisdiction. And a fleet, by being in any part of the ocean, where the persons who compose it, cannot acquire property, will



no more make that part of the ocean the object of a nations jurisdiction, than an uninhabited country is made the object of its jurisdiction by the passage of a land-army through the country without acquiring any property there. An armed fleet, when it lies in any part of the ocean, may certainly repel any armed force, that attacks it; not because this part of the ocean is under the jurisdiction of the fleet, or of the nation, to which the fleet belongs; but because it is under no jurisdiction at all. A fleet of fishermen have likewise a right, when they are fishing in any part of the ocean, to drive all others from thence, that shall come to fish upon the same spot, where their nets are. But this right does not arise from any jurisdiction over the ocean, but from the community of it. The place is common to all mankind to be used by all, as they have occasion; and those, who have first seized it to use it, have a right to use it first. This right indeed arises from seizure or occupancy: but we must distinguish between the occupancy of a common thing to use it, and such occupancy, as separates the thing from the common stock, and gives the occupant property in it.

A nation has jurisdiction, in respect of territory, over so much of the ocean, as is included within the land: so that all ships and all persons, who are in them, are under the jurisdiction of the nation, if they are in any of its ports, or in any bays, or other arms of the sea, which are appendages to the land. This jurisdiction extends itself likewise into the mean ocean, as far as the low-water mark: for the shore itself, though this part of it is sometimes covered with water, reaches thus far. But all beyond this is out of the jurisdiction: the nation can have no right of territory in it; because, as it is in its own nature an uncertain and indeterminate thing, it will not admit of such occupancy as produces property; and those things, which are incapable of being appropriated, do not admit of jurisdiction.

It is commonly said, that a more extensive jurisdiction will be of use to nations, which border on the sea ; that the sea is their bulwark ; that in order to secure themselves against being attacked on this side, it is necessary for them to be lords of the sea, as far as they can extend their force from the shore by means of great guns, or other instruments of the like sort ; and that it is reasonable the territory should extend so far, because all armed ships, which come within that distance, are able to do them mischief and are indeed within their bulwark. What is thus urged might have some weight ; if foreigners, who come with armed ships and are likely to do mischief to a nation, could be proceeded against only by the civil laws of the country. For its civil law takes place only within its territory : and consequently if as much of the ocean, as is here claimed, was not within the territory, an armed force must be near enough to do mischief from the sea, or if the territory reaches only to the low-waters mark, it must even be landed ; before the nation would have a right to repel it. But this is not the case : two nations in respect of one another are in a state of equality : and any danger which one of them apprehends from the other, is to be guarded against or repelled, not by such means as the civil law will furnish, but by such as the law of nature applied to the collective persons of civil societies will allow of. Now in a state of equality, where there is reason to believe that an injury is intended, the law of nature will allow us to demand security, that we shall not suffer it, of those, who are otherwise likely to commit it ; though the injury is a distant one : and where such security is refused, the same law will allow us to make use of force for obtaining it. Thus the law of nations will render the sea as effectual a bulwark to a nation,

which is washed by it on one side, or encompassed by it on all sides, though the territory of the nation ends at the shore; as the civil law would, if the territory extended from the shore to the utmost random of a great gun.

▪ If one nation has obliged itself to another, by particular compact, not to go into some particular part of the ocean with an armed ship, or not to come hither either for the purpose of fishing, or for such other purposes, as are specified in the compact, the latter of these nations will have a right to hinder the former from doing what it has thus obliged itself not to do. But this right does not arise from any property in this particular part of the ocean, or from any jurisdiction over it, but from the good faith of compact. The effect of this compact may easily be distinguished from property or jurisdiction. Property or jurisdiction is a right of excluding all nations from the use of a thing: whereas this compact produces such a right only against the single nation, which has made itself a party to it: this nation is not at liberty to go into that part of the ocean, into which it has bound itself not to come; but all other nations, that are not parties to the compact, are as much at liberty to go thither, as if no such compact had been made. It is possible, that a nation may, in much the same manner, acquire a sort of exclusive right of fishing in such parts of the ocean, as are near to its own coasts. For as one nation might bind itself by compact not to come thither for this purpose; so all nations, that are likely to come thither, might bind themselves in the same manner. A tacit compact might likewise produce a right of the same sort: those maritime nations, that are in the neighbourhood, may tacitly have consented to establish this right by submitting from time to time to be excluded from fishing near to the coasts of the nation, which acquires the right. But this consent does not



give the nation, whose coasts they are, either property or jurisdiction in those parts of the ocean, which are near to its coasts. This usage binds only those, who have made themselves parties to it by such submission or acquiescence: it does not bind remote nations; nor does it bind even neighbouring nations, that are lately become maritime ones: because as neither of them have ever acquiesced in the usage, or submitted to be excluded from fishing in these particular places, they have never made themselves parties to the compact of exclusion.

IX. We have <sup>v</sup> already explained the general notion of war, and have considered the nature of private war in particular. This is the only sort of war, that could happen in the liberty of nature. For though such a number of independent individuals might occasionally join together in the use of force, as would make an army equal to those, which nations commonly bring into the field, yet a war, which is carried on with an army of this sort, would not be a public one. Public war is distinguished from private, not by the number of forces or the greatness of the army, that is employed, but by the character of the persons, who are the contending parties in it. A war of private persons or individuals will be a private war, whatever the numbers may be that engage in it, and take part with one side or the other. <sup>w</sup> Public war is the war of public persons; that is, of civil societies: and consequently there can be no such war, where there is no civil union, But civil societies act, in their intercourse with one another, by their respective supreme executive bodies; whether it is the friendly intercourse of leagues and conventions, or the hostile intercourse of war. A war therefore will be a public one, though it is no otherwise the act of those civil societies, that are the contending parties in it, than as it is the act of their respective executive bodies.

Different  
sorts of  
war.

<sup>v</sup> See B. I. C. XIX. § I. II.

<sup>w</sup> Grot. L. I. C. III. § II.

All magistrates indeed are public persons : and from hence a question may arise ; whether every war, which begins from any magistrate whatsoever, is public war, or whether this name is confined to those wars only, that begin from supreme magistrates ? \* Grotius treats this as a question about words, the use of which is arbitrary : we are at liberty to give the words—public war—either of these senses ; provided we explain beforehand the sense, in which we use them, and take care to use them steadily in this sense. But this answer will scarce satisfy the enquiry. For they, who make it, do not want to be informed, what sense they are at liberty to give these words ; but in what sense they must use them in order to speak the language of the law of nations.

To clear up this matter, we may observe first ; that since a magistrate in any civil society is no otherwise a public person, than as he has authorized to act for the society ; no act, that he does without being authorized by the society to do it, is done by him as a public person, or can be called a public act. A war therefore, though it begins from a person, who is a magistrate, will not be a public war, unless it begins from him as a magistrate ; that is unless he is authorized by the society to make war.

Secondly ; in a civil society there are commonly two sorts of inferiour † magistrates invested with executive power : one sort is invested with the internal, and the other with the external branch of it ; some magistrates are commissioned by the society to act with the public civil force to put the laws in execution at home ; whilst others are commissioned to act with the public military force to defend and maintain the rights of the society against its enemies from abroad. The civil law considers the former sort of magistrates as public persons : but in the view of the law of nations, as they have no concern with any other nations, they have no

\* I. I. C. III. § IV.

† See B. II. C. III. § XI.

public character, or are not public persons. A war therefore, which begins only upon the authority of such magistrates as these, is not a public war in the language of the law of nations.

Thirdly ; amongst those magistrates, who are appointed to act in the external branch of the executive power ; some have only a subordinate authority : and as these do not act for the nation at their own discretion, but are under the direction of the supreme executive body, their character in respect of other nations is not a public one. A war therefore, which proceeds only from their authority, cannot be called a public one by the law of nations.

Upon the whole ; whatever liberty we have to use words in what sense we please ; the law of nations will call no war a public one, unless it proceeds on both parts from those, who are invested with supreme executive power in the external branch of this power : for in a view of this law no other magistrates have a public character in respect of war.

<sup>z</sup> Grotius extends the notion of public war to all war, which begins from any magistrate whatsoever : and to justify this extensive sense of the words, he maintains, that even inferiour magistrates, since they are appointed for the defence and security of the people in their several districts, must in consequence of their appointment have a right to make war, where the defence and security of that part of the people, which is committed to their trust, requires it ; unless they are laid under some positive restraint by civil law. He allows however, that in fact most or rather all civil societies have taken care by some positive provision to lay their inferior magistrates under such a restraint : because, as the safety of the whole society is hazarded in war, it was proper to confine the right of making war to the supreme executive body, which has the care

<sup>z</sup> L. I. C. III. § IV. V.



of the whole. But the contrary opinion is more consistent with the nature and effects of social union. The appointment of an inferior magistrate does not leave him at liberty to make war, till some positive civil law restrains him: on the contrary such magistrates can have no right of making war, unless this right has been given them by some positive civil law. In consequence of social union the exercise and direction of the common force belongs to the collective body of the society, and not to any particular part of this body: nothing but a positive appointment made by this body itself in settling the constitution, or by the legislative body, which, after the constitution is settled, acts for the collective body, can naturally authorize any particular part of the society, or any particular person in it, that is, any executive body or any magistrate, to exercise and direct the common force. A magistrate, who is appointed to act in the internal or civil branch of the executive power, can only use this force at home, and is restrained by the nature of his office from using it any otherwise even at home, than under the direction of the civil law. Such a magistrate therefore has no more right to make external war, than a private person. And the use, which he is authorized to make of the public force at home, to put the laws in execution, if it can be called public war at all, is only public war by the civil law, and not by the law of nations. In the external branch of executive power the notion of an inferior magistrate or subordinate commander implies, that the society has appointed him to act, not at his own discretion, but under the direction of the supreme executive body. The nature therefore of his appointment, though he is a magistrate, gives him no right to begin an external war.

But though all magistrates of one sort, and all inferior magistrates of the other sort, are restrained by

the nature of social union and the terms of their respective appointments from making war; it may be asked, whether there are no cases, in which this restraint is taken off, and consequently in which a war, that is made upon the authority of any magistrate whatsoever, will be a public one? Grotius mentions two cases, which he supposes to be of this sort: first, when the ordinary officers of a magistrate are sufficient to restrain a few disobedient subjects without hazarding the safety of the whole society; or secondly, when some immediate danger arises, which will not allow him to have recourse to the supreme magistrate for his authority. In the first of these cases our author proceeds upon the principles, with which he set out; that all magistrates are naturally at liberty to make war, if they are not restrained by some positive law; and that the design of such positive law is to prevent the safety of the whole society from being hazarded by a person, who is only entrusted with the care of a part: from whence he concludes, that where, without hazarding the safety of the whole, any inferior magistrates by the help of their ordinary attendants can repress a few rebellious subjects, the obligation of these restraining laws ceases, because the reason of them ceases. We must certainly allow, that, where a magistrate has any ordinary attendants assigned to him by the public, for the purpose of using the common force, he has authority to employ them for this purpose. But this authority extends no farther, than the nature and end of his appointment extends: if in any instance he uses even the force, with which he is intrusted, in any other manner, or for any other purpose, than is warranted by his appointment; this, as it is his own act, and not the act of the public, cannot be called public war. The restraint, that he is under, does not arise from any

positive act of the law, but from a negative act of it: he has no right to use the force that is in his hands, at his own discretion; not because any positive law has restrained him from doing any thing, which as a magistrate he might otherwise have done; but because as a member of the society he has no right to use the public force at all without the concurrence of the society: and consequently, though he is appointed to be a magistrate, he has no right to use it any farther than the law has empowered him. It is neither the equitable consideration, that he, who is entrusted only with the care of a part, ought not to hazard the safety of the whole, nor any positive law made upon this equitable consideration, that restrains an inferior magistrate from making war at his own discretion. The restraint arises at first from social union, and continues even after he is appointed to be a magistrate, as far as the law has not taken it off by the express terms of his commission, or by the nature of the magistracy to which he is appointed. And if the laws had not thus given him a discretionary power, however possible or however likely it might be, that the force, which he could exert by his ordinary attendants, would repel or stop an insurrection; yet he is not at liberty to exert this force, as a magistrate, any otherwise than the law has commissioned him: because beyond his commission he has no more right than a private person, to judge about this possibility or this likelihood and to act upon such judgment. In the second case we agree with our author, that an inferior magistrate may use what force he has at hand, to repel such an immediate danger, as will not allow him time to have recourse to the supreme executive body. But this act of force is no more a public war upon account of his being a magistrate, than it would have been, if the same private persons, who act with him, had acted without him.



The force which he exerts for this purpose, if in exerting it he exceeds the commission, under which he acts as a magistrate, is only private force. It is not his authority, but a failure of jurisdiction, upon account of the exigency of the case, that makes the force lawful.

After what has been said, it will be needless to enquire whether an inferior magistrate, where he is not pressed by any such exigency, may make war, as he sees opportunity, upon a conjecture, that the supreme executive body would authorize him, if he was to consult it. For an inferior magistrate has no right to act with force beyond his commission. If therefore the nature of his office and the terms of his appointment have given him no discretionary power; he has no right to act upon any conjecture, which he makes, about what he might probably be authorized to do, if he was to consult the supreme executive body.

All wars of a nation against its external enemies are not public wars. To make a war a public one, both the contending parties must be public persons; that is, it must be a war of one nation against another; and consequently it must begin and be carried on by the authority of the supreme executive body on both sides. Where a nation makes war upon pirates or other robbers, though these are external enemies, the war will be a mixed one: it is public on one side; because a nation or public person is one of the parties: but it is private on the other side; because the parties on this side are private persons, who act together occasionally and are not united into a civil society. A band of robbers or a company of pirates may in fact be united to one another by compact; and may have stipulated with one another in this compact to be directed by the common understanding and to act by the common force for their general benefit. But they are still by the law of nature only a number of un-

connected individuals; and consequently in the view of the law of nations they are not considered as one collective body or public person. For the compact, by which they unite themselves, is void: because the matter of it is unlawful. The individuals, that form themselves into a civil society, are bound by their social compact to pursue and to maintain a common benefit: but this common benefit is such an one, as is intended to be consistent with the obligations, which they are naturally under to the rest of mankind. Whereas the common benefit, which a band of robbers or a company of pirates propose to themselves, consists in doing harm to the rest of the mankind.

When any of the members of a civil society make use of force to oppose the execution of the laws, or to support themselves in the violation of them, and the magistrates, who are entrusted with the internal executive power, exert the civil force to repel or to repress them; this is a contention by force, and may therefore be called war; though in our common way of speaking we do not usually give it this name. On one side it is a riot, or a tumult, or a sedition, or an unlawful resistance. But I do not know, that in our language there is any particular name for it on the other side. According to our authors notion of public war; this use of force on the side of the magistrate would be a public war, and the whole act of contention, if we take in both parts, would be a mixed war. But in the language of the law of nations it is certainly neither public nor mixed. For this law relates only to the intercourse of a nation with the rest of mankind, and takes no notice of what passes within a nation, either between the several members of it, or between the body and any of the members. If the force, which is made use of for these unlawful purposes by

the members of the society, should be so great, as to make it necessary for the civil magistrate to take the military force to his assistance; yet as long as this force is under the direction of such a magistrate, the contention is still what it was before: it has no name on the part of the society, and is called a riot, or a tumult, or a sedition, or an unlawful resistance, on the part of the members.

When the seditious members are so strong, that the executive body is obliged to interpose and to take the command and direction of the military force; this contention is called a rebellion on the part of the subjects, and may be called a civil war on the part of the society. A contention by force is a mixed act of the same sort and may on each part be called by the same names, where the subjects endeavour by unjust force to overturn the government, and the executive body on behalf of the society interposes with the military force to support it.

In monarchies either absolute or limited, where the matter in dispute is the title to the crown, and this title has been left doubtful by the civil law, a contention by force is a civil war on both parts. But if the civil law has clearly determined the title, such a contention by force is a rebellion on the part, that claims against the civil law, and a civil war only on the part that claims under it.

Where force is made use of by the members of a civil society to resist such tyrannical oppression of the governours, as is subversive of the ends of social union; a war of this sort cannot properly be called rebellion; since this name imports a forcible opposition to lawful authority. And the presumption, that civil governours will always discharge their duty, has prevented mankind from giving it any name, which implies injustice on the side of the governours. Such a war therefore goes under the general name of a civil war.



If any one should ask, whether these internal wars of a civil society are public, or private, or mixed? we must certainly answer, that, in the language of the law of nations, they are neither. For since this law takes no notice of what passes within a civil society, as far as what passes there has no reference to the rest of mankind; it has no occasion to mention wars of this sort, and therefore gives them no name; it does not so much as call them wars; and much less does it rank them under the heads of public, or private, or mixed. The reason, why some writers have thought, that these contentions by force within a society are not to be called wars at all, may perhaps have been, that the law of nations does call them so. But this reason is of no weight: for the law of nations does not call them wars; not because they are not wars; but because they are such acts, as do not come within its view, and as it has therefore given no name to. They have certainly the nature of wars; for they are contentions by force. Common usage likewise has given them this name and calls them civil wars. And if, instead of attending to the precise language of the law of nations, we attend to the nature of the acts; we shall find, that civil wars may be either public, or mixed, or private. A civil war upon a doubtful title to the crown may be called a public one; because the heads of each party are respectively considered by their own people as public persons. Where the contention by force is a rebellion on the part of the people, and a civil war on the part of the government; this is a mixed war: one of the parties is under the conduct of a public person and the other consists of private persons. And since the people cannot act upon a right of resistance, but only so far as they are not in subjection and the governours have no jurisdiction; a civil war, which begins and is

carried on upon this right, may be called a private one : because, where there is no subjection on one side, and no jurisdiction on the other, the persons concerned are in respect of one another private persons.

X. Public war is divided into perfect and imperfect. The former sort is more usually called solemn according to the law of nations, and the latter unsolemn war. Grotius defines perfect or solemn war to be such public war as is declared or proclaimed. Indeed the very name of war is so far appropriated by common usage to solemn war, that, when we speak of war, we are generally supposed to mean this sort ; unless we add some term of distinction to shew, that we mean some other sort, by calling it a private war, or a civil war, or a piratical war. Unsolemn or imperfect wars between nations, that is, such wars as nations carry on against one another without declaring or proclaiming them, though they are public wars, are seldom called wars at all : they are more usually known by the name of reprisals or of acts of hostility.

Solemn  
war what  
and why  
called just  
war.

Thus we find, that to make a war a solemn one, according to the law of nations, <sup>a</sup> two things are required : first it must be a public war ; that is, the contending parties must be two nations acting respectively under the direction and by the authority of their supreme executive body : and secondly it must be proclaimed, notified, or declared. The use of the common force of a nation by lawful authority to quell insurrections, or to repress rebellions, though we find, that there is sometimes a declaration of war, at least on the side of the rebels, is not a solemn war according to the law of nations ; because this law does not consider it as a public war : and reprisals, though they are contentions by force between two nations, and may therefore be called public wars, are not solemn wars ; because

<sup>a</sup> Grot. L. I. C. III. § IV.

they are not preceded by any exprefs and open declaration of war.

Perhaps another definition of folemn war may be found, which will help us in explaining the natural effects of proclaiming or declaring war. A folemn war is a war, which appears evidently to be a national act on both fides, or to be the war of the whole collective body of one nation againft the whole collective body of another. This definition includes all that is included in our authors definition. A war cannot be a national act on both fides without being a public one: and it cannot appear evidently to be a national act without being proclaimed or declared.

When a folemn war is called, as it fometimes is called, a juft war according to the law of nations; <sup>b</sup> Grotius imagines, that this appellation is intended to denote, not that the law of nature or of nations allows only this fort of war, and forbids all other forts, but that this fort produces, — *quofdam juris effectus*, — certain effects by the law of nations, which no other fort will produce. The effects, which he means, are impunity for what is done, and property in what is taken. We will enquire prefently how far thefe effects are peculiar to folemn war, and in the mean time will examine our author's opinion about the reason for giving the name of juft wars to wars of this fort. What he has advanced about the effects, which the law of nations allows to folemn wars, and about the reason for calling them juft wars upon account of thefe effects, he explains by the two instances of marriages and wills. When the Roman law calls the matrimonial union of free perfons a juft marriage; this appellation, he fays, is not intended to denote, that the matrimonial union of flaves, though this has not the fame appellation given to it, is unjuft or forbidden, but only that the former

<sup>b</sup> Ibid.



produces some effects or some claims by this law, which the latter does not produce. In like manner when a will as it is distinguished from a codicil, is called a just will by the same law, we are not to understand from hence, that making a codicil is an unlawful act, but only that this law gives some effects to a will, which it does not give to the codicil.

But perhaps a just marriage and a just will might derive this appellation rather from their nature, than from their consequences. Some matrimonial unions seem to have been called just marriages, not upon account of the effects of law, which they produced, but upon account of their legal perfection, that is, their exact conformity to the strictest or highest rules, which the law relating to such unions had prescribed: whilst other matrimonial unions, though the law, as it had not forbidden them, allowed of their validity, which were not called just marriages; because they wanted this conformity to the highest rules of the law, and were therefore in the view of the law imperfect in their kind. In like manner one sort of disposition of a man's goods upon the event of his death seems to have been called a just will, whilst another sort was called a codicil without the appellation of just; because the former was perfectly conformable to the strictest notion, that the law had of such a disposition, or was attended with all the qualities, that the law required; whilst the latter, having no more requisites of law, than were necessary to make it a valid act, fell short of legal perfection.

The Roman writers apply the word — just — to some wars, and distinguish them from other wars, to which they do not give the same appellation. But when the former are thus called just wars; this appellation is not designed to denote, that they produced any peculiar effects of law, but only that in the manner of beginning them, they were exactly conformable to the rules

of their feacial law or law of arms. When they call this law the law of nations; we are not to understand from hence, that it was a pofitive law eftablifhed by the confent of all nations. It was in infelf only a civil law of their own: they called it a law of nations; becaufe the defign of it was to direct them, how they fhould behave towards other nations in the hostile intercourfe of war; and not becaufe all nations were obliged to obferve it.

I do not deny, that fuch acts, as are called juft ones, upon account of their legal perfection or their exact conformity with law, produce effects, which other acts, that are lefs perfect in their kind, will not produce: I only deny, that thefe effects of the law are the reafon, why the acts are called juft ones. And in denying this I am fupported by a very common ufe of the word—juft. We frequently apply it to both actions and to things to denote, that they are perfect in their kind. In this fenfe we fpeak of a juft battle, a juft army, and a juft volume, to diftinguifh them from a skirmifh, a fmall party, and a pamphlet. Since therefore actions are thus called juft, to denote, that they have a general perfection in their kind; it is reafonable to conclude, that, when they are called juft in reference to any law, this appellation fhould be underftood to denote, that they have a legal perfection in their kind.

For thefe reafons I am inclined to think, that a folemn war is called a juft one according to the law of nations; becaufe in the view of this law it has fome fort of legal perfection. But this perfection cannot confift in an internal conformity with the law: for if it did, as this law is only the law of nature applied to the collective perfons of civil focieties, no wars could be called juft, unlefs they were moved upon fuch reafons, as the law of nature will juftify: whereas in the fenfe, that we are now enquiring about, wars are called

just, provided they are solemn, without any regard to their internal reasons. The legal perfection therefore, upon account of which solemn wars are distinguished from other wars by this appellation of just, is merely external. The reader may probably see by this time what this external perfection is. As nations are the only proper objects of the law of nations; no contention by force is properly called war in the language of this law, unless nations are the contending parties, that is, unless it is a public war. But amongst the wars of nations, some are imperfectly public. If one nation seizes the goods of another nation by force, upon account of some damages, which the former has suffered from the latter; such contentions by force are called reprisals. There may likewise be other acts of hostility between two nations, which do not properly come under the notion of reprisals, such as the besieging of each other's towns, or the sinking of each other's fleets, whilst the nations in other respects are at peace with one another. These are public wars, because nations are the contending parties. But as they are confined to some particular objects, they are of the imperfect sort, and do not come up to the highest notion of a public war, which consists in a war of the whole collective person of one nation against the whole collective person of another nation. The design of a declaration of war, by which the war becomes a solemn one, is to bring it up to this highest notion of public war, or to make it perfectly public: and it is this legal perfection, from whence such wars have the appellation of just ones: by calling them just wars we only mean, that they are perfect ones according to the law of nations.

XI. The law of nations considers each civil society as a moral person, and all the several societies of the world as so many distinct persons in a state of natural

Justifying  
causes of  
war.



equality. Since therefore an injury is by the law of nature the only justifiable cause of war amongst individuals in a like state of equality; nothing but an injury will justify a war amongst civil societies by the law of nations. But <sup>c</sup> as amongst individuals, so likewise amongst civil societies, an injury will make the use of force just, either before or after it is done. Force may be made use of amongst nations, to guard against an injury before it is done; to stop it, when it is beginning; to obtain security, that it shall not proceed; or to repel it, when it is near at hand. After an injury has been done, it produces both a right to recover reparation for the damages, that have arisen from it, and a right likewise to inflict punishment in order to prevent the nation, which has done harm now, from doing the like again.

By the law of nature a future injury is not a just cause of private war, unless there is a plain design of doing it and no other way of preventing it from being done. And this law, when it is applied to civil societies, and so becomes a law of nations, makes no farther allowance in favour of public war. <sup>d</sup> The growing power therefore of a nation, whilst it abstains from doing and from attempting to do injuries to its neighbours, is no justifiable cause for them to make war upon it, in order to stop the growth of its power, before it has acquired strength enough to give it an opportunity of injuring them. For it is only the apparent design of doing an injury, and not the power of doing one, that makes defence by force lawful. In deliberations about war some regard may indeed be had to the probability, that a nation will grow too strong for us, if we do not take care to reduce it in time. But this can only be regarded as a prudential cause and not as a justifiable cause of war. If other causes make

<sup>c</sup> Grot. L. II. C. I. § II. <sup>d</sup> Grot. L. II. C. I. § XVII. C. XXII. § V.

a war just, this consideration will make it adviseable : but this consideration alone is not sufficient to justify a war, if no injury has yet been done or attempted.

The law of nations being the same amongst civil societies with the law of nature amongst individuals ; nothing but what is strictly or properly an injury will justify a public war. From whence it follows, that where any nation makes war upon another only upon account of <sup>e</sup> some neglect or refusal of what is matter of favour, or of courtesy, or even of humanity, such a war is contrary to the law of nations. The false religion likewise of a nation can be no otherwise a just cause of making war upon it, than as this religion has actually produced some real and proper injury or some attempt to do such an injury.

Not only such injuries, as affect a nation immediately in its collective capacity, <sup>f</sup> but such likewise, as are done to any of its members, are a justifiable cause of war. For these, by the law of nations, are parts of the collective person of a nation ; and injuries, which are done to parts of this person, are done to the person itself. But when we speak of an injury, which is done to one member or to a few members of a civil society, as a justifiable cause of war ; it is necessary to distinguish between what is a just cause of war in respect of the nation itself, to which these members belong, and what is a just cause of war in respect of the nation, that has done the injury. As a civil society is obliged by the social compact to guard the rights of its several members ; so it is obliged likewise by the same compact to guard the common interest of the whole. Unless therefore the injury, which some of the members have suffered, affects, either in itself or in its consequences, the whole society, or such a part, as bears a considerable proportion to the whole ; however it might justify

<sup>e</sup> Grot. L. II. C. XXII. § XVI.      <sup>f</sup> L. II. XXV. § I, II.

a war in respect of the nation, which has done the injury; it would scarce justify the governours of the nation, to which those, who have suffered the injury belong, in respect of the duty, which they owe to their own society, if they should hazard the safety of the whole by a war, and sacrifice the lives of many and the fortunes of most of their subjects to redress such an injury. In the mean time the duty, which the society owes to its injured members, is not superseded. Though the society is not obliged to redress them by war, when this method of redress is inconsistent with the general interest; yet it is still obliged to secure their rights: and this obligation can be no otherwise discharged than by making them amends out of the public property for what they have lost.

Amongst the other ways, in which an injury is a just cause of war, we have mentioned the right of inflicting punishment, where an injury has been committed. And as individuals have this right in a state of equality, the law of nations gives the same right to the collective persons of civil societies. Where an injury has been done, a nation, like an individual, has not only a right to a reparation of the damages, which it has sustained, but it has likewise a right, where there was any malicious design of doing harm, to take such measures with those, who have done it, as may prevent them from doing the like again.

A nation may be accountable for the act of one of its members.

XII. The law of nations does not suppose that a civil society must necessarily be a principal or an accessory in every act, which is done by any of its members. For this law, whilst it considers the several members as parts of the collective body, does not suppose each member to have no will of his own, or to be incapable of acting for himself without the command or the consent of that body. But though a nation is not

<sup>s</sup> See B. I. C. XIX. § III.



necessarily an accessory to every injury, which is done by any of its members either to the general body or to the particular members of other nations; yet it may make itself an accessory either <sup>h</sup>by conniving at the injury, whilst it is committed, and neglecting to prevent it, or by protecting those, who have done the injury, against the just demands of those, who have suffered it. By means therefore of such connivence or such protection a society becomes accountable for the crimes or faults of its members.

Amongst individuals the faults of servants may in many instances be charged upon their master; because they are under his authority, and it is his business to take care, that they do not misbehave themselves. And upon the same principles the neglect of a nation, in not preventing the subjects of it from offending, will make the nation a party in their offence: for the nation, since they are under its jurisdiction, is obliged to take care, that they do no harm to the rest of mankind. But such neglect does not make a nation accessory to the acts of subjects, that are in a state of rebellion and have renounced their allegiance, or that are not within its territories: for in these circumstances, the subjects, whatever they may be of right, are not under its jurisdiction in fact. The law of nature, as it respects civil societies, and is called the law of nations, is something different in this matter from the same law, as it respects individuals. Servants are commonly under the eye of their master, so that he has constant opportunities of knowing what they do: whereas subjects are not so immediately under the eye of the society, that is, of the civil governours, who act for it; and consequently many things, which are done by the subjects, may escape their knowledge.

<sup>h</sup> L. II. C. XXI. § I. II. III.

Now the general rule of law is, that no person, either individual or collective, can by means of any neglect, in not preventing the fault of another, be an accessary to the fault, unless he was obliged to prevent it, and knew likewise, that the fault was committed: for however he might upon other accounts be under a general obligation to prevent it; yet if he did not know of it, he could not in this particular instance be under any such obligation; because no person's obligation extends beyond his knowledge. From hence it follows, that the same law of nature, which charges all the faults of slaves upon their master, will only charge such faults of subjects upon a nation, as were too frequent or too notorious to escape the knowledge of the public.

After an injury has been committed; a nation by protecting the offender against those, who have a right to require reparation of damages or to inflict punishment, in order to defeat their right, makes itself a party in the injury. Connivence, or neglect to prevent an injury, cannot make a nation a party, to the injury, unless the offender is one of its own subjects, or at least was within its territories, when the injury was done: because in any other circumstances he is not under the nation's jurisdiction. But by granting protection to an offender it may become a party not only in such injuries, as are committed by its own proper subjects, or by foreigners, who by being resident within its territories make themselves temporary subjects, but in such likewise, as are committed abroad either by its own subjects, or by foreigners, who afterwards take refuge in its territories.

But the law of nations, by considering every civil society as a distinct and entire body, which is united into one collective person by a social compact, for the purpose of securing and advancing its own welfare, allows every civil society to have an exclusive jurisdiction over its own

members : for it could not be a distinct and entire body, if its members were subject to any other jurisdiction, besides its own. Now the notion of an exclusive jurisdiction vested in each nation implies, that it has a right to judge for itself, how far its own members are to be punished, and whether they are to be punished at all or to be pardoned. From whence it seems to follow, that a nation by not punishing one of its members, or by not suffering any one else to punish him only exercises such a jurisdiction as the law of nations allows. And the protection of a subject against punishment is, in this view of it, so far from making the nation a party in any injury, which he has committed, that it discharges the subject himself from all obligations, that arose from thence. But this difficulty, if it is one, arises merely from not attending to the nature of that exclusive jurisdiction, which the law of nations allows to every civil society. For it is only a jurisdiction within the society itself, that is, a jurisdiction where none but itself and its own members are concerned, and consequently does not extend to such offences, as we are now speaking of, to offences, which are committed by the members of one society either against the body or against the members of another. Neither the nature of social union, nor the consent of mankind to consider civil societies as distinct and entire collective persons, will give any nation an exclusive jurisdiction, where the offences are of this kind.

There is another difficulty in this matter, which is of more importance. Every nation has an exclusive property in its own territories. <sup>i</sup> No persons therefore, who are not members of it, can lawfully come thither without its leave. And whatever right of harmless profit they might pretend, yet if the nation apprehends, that it would be dangerous to itself to let them come thither, the law of nations does not oblige it to give

<sup>i</sup> Grot. *ibid.* § IV. V.



them leave. If therefore any person is found within its territories, who has committed an offence against a foreign nation or against the members of a foreign nation ; what is to be done with him ? The nation, in whose territories he is, cannot justly punish him, if what he has done, though it is a crime by the law of nature or of nations, is not forbidden by its own civil law. It would be dangerous to the nation to admit foreigners to come into its territories with an armed force to punish him : and consequently, as they cannot come thither without leave, so in view to the safety or at least to the peace of the society, it would be wrong to give them leave. And yet, if the nation screens him from punishment, it becomes a party in his crime, and gives those, who are offended a just cause of making war upon it. What remains therefore for the nation to do, is what the injured nation has a right to demand : he ought to be delivered up to those, against whom the crime is committed, that they may punish him within their own territories. This is the right. But how far a nation, that has been injured in itself or in its members, will chuse either to insist upon this right at first by demanding the criminal, or to support it afterwards by force, if the demand should not be complied with, depends upon its own discretion. And if it is a general practice in Europe, as Grotius affirms that it is, to wave this right, unless where the crimes are very heinous ; the practice has been taken up upon principles either of political prudence or of tenderness towards the offenders : for whatever may have been established amongst particular nations by express compacts, there is no general law, which obliges all nations in the word, or all nations in Europe, to hold this conduct.

We may observe by the way, that when a nation thus deliver up one of its subjects, this is not incon-

sistent with the social rights of such subject: for by the social compact he acquires only a right to be protected against suffering causeless harm, and not a right to be protected in doing causeless harm.

When a state delivers up an offending member to pacify an enemy, and the enemy, either having some other cause of war, or being resolved to make war at any rate, refuses to receive him; <sup>k</sup> Grotius enquires whether he continues a member of the state after this act, or whether it deprives him of his right of citizenship? Cicero maintains, that the right of citizenship continues; because such a delivering up of a member is a sort of a donation, and can therefore produce no effect without acceptance. And undoubtedly, if we keep to the strict notion of delivering up, there can be no such act on one part, if there is no acceptance on the other part: for the strict notion of delivery implies acceptance: where there is no acceptance, there may be an attempt or endeavour to deliver, but there can be no actual delivery. But the question is, whether the act of the state, though it cannot be strictly and properly called delivery, is not of such a sort, as cuts off the right of citizenship? Grotius explains this act to be nothing more than a permission to the enemy to punish the offending member: and as the state by such permission does not give any right to the enemy over the offending member, but only removes the impediment, which its own right of territory had laid in the way of punishment; it cannot by this act be understood to deprive its own member of any right: for where no right is given on one side, no right can be taken away on the other side. But this is an imperfect description of the act of the state: this act does not consist merely in permitting the enemy to punish him, but in withdrawing protection. Scævola, as he is

<sup>k</sup> Ibid.

quoted by Grotius, explains it in this manner, and from hence concludes, that the member loses his right of citizenship, or ceases to be a member, whether the enemy accepts him or not: because where protection is justly withdrawn, there can be no right of citizenship. We may however reply, that the state withdraws its protection only for a certain purpose, and not absolutely; for the purpose of putting it into the enemy's power to punish the offending member, from whom protection is thus withdrawn. In all other respects his right to protection, which is the foundation of citizenship, continues. And if this purpose does not take place; as it does not, where the enemy refuses to receive him; his right remains entire.

How far it would be <sup>l</sup> lawful for a state to deliver up one of its members, who has committed no crime, in order to preserve itself from being destroyed by a powerful enemy, depends upon the claims arising out of civil union and not upon the law of nations. For we are not to enquire here, whether one nation can justify itself in making such a demand upon another? but whether the nation, upon which the demand is made, can lawfully comply with it?

In speaking of the power of a society over a whole province or any other considerable part of it, <sup>m</sup> Grotius determines, that it has no right to alienate such parts without their consent. For the right, which the society has over them, depends upon the original compact, by which they united themselves to it: and since the terms of this compact are, that they will pay allegiance to the society in return for protection; they cannot be understood to have given the society by this act a right to cut them off from it causelessly, and to put them under the jurisdiction of any other society: because if the society has this right, the corresponding obligation

<sup>l</sup> Grot. I. II. C. XXV. § III. <sup>m</sup> L. II. C. VI. § IV. V. VI. VII.



of the parts must be, not only an obligation to be directed by the will of the society in return for protection, but even to obey the society, where their obedience would put them out of its protection. He determines in like manner, that a part cannot transfer its allegiance to another society without the consent of the society, of which it is a part. Necessity however would justify the part in thus transferring its allegiance: because the social compact, like all other compacts, admits of the equitable exception of necessity.

But here Grotius adds, that the part has in this respect a fuller right than the whole. Necessity, by superseding the obligation of the social compact, supercedes all civil jurisdiction. The part therefore, in these circumstances, is under no other obligation towards the whole, than it would have been in a state of nature; where there is no such relation of part and whole, of subject and society, and consequently no obligation of one towards the other. But if this is the effect of necessity, if it reduces things to the state of nature, and so leaves no civil jurisdiction; the society can have no extraordinary authority over any part of it, grounded upon the plea of necessity, to cut such part off from the general body, and to place it under a new and foreign jurisdiction. Necessity, instead of giving the society such an extraordinary authority, puts an end even to its ordinary jurisdiction.

I agree with our author, that necessity does not give the society such an extraordinary authority. But he seems to be mistaken in supposing, that necessity gives the part a fuller or more extensive right in respect of the society, than it gives the society in respect of the part. For when a part of any society transfers its allegiance, this act, as far as it relates to this particular society, is only the withdrawing of allegiance. What

follows this act, or what attends upon it, when the part, which so withdraws allegiance from one society, puts itself under the jurisdiction of another, has no relation to the former society. We do indeed call the whole act a transfer of allegiance: but what is done in such a transfer relates to this society no otherwise, than as allegiance is withdrawn from it. Whether the part puts itself under another jurisdiction, by joining itself to some other nation, or whether it forms itself into a nation and sets up a jurisdiction of its own, or whether the several individuals, that compose it, live independently afterwards in a state of nature; the society, to which the part belonged, is not concerned in any of these acts. If the part could of right withdraw its allegiance, any of these acts will be equally lawful. The question therefore about the right of any part of a society to transfer its allegiance to another society, when it cannot otherwise be preserved, amounts only to this, whether it has a right in such circumstances to withdraw its allegiance. And if necessity by superseding the jurisdiction of the society will give it this right; the part and the whole are in the same condition, or have an equal right, in respect of one another. For as necessity supercedes the obligation of the part to pay allegiance, so a like necessity will supersede the obligation of the whole to give protection. Grotius therefore is mistaken in his conclusion for want of stating the question properly. He compares what the part does in transferring its allegiance with what the whole does when it alienates the part. Whereas when the part transfers its allegiance, this in respect of the society is only the withdrawing of allegiance, and ought therefore to be compared with what the whole does, when it withdraws protection. In this comparison there is no difference between their respective rights: if necessi-

ty by taking away the obligation of the social compact allows the part to withdraw allegiance; a like necessity will upon the same principle allow the whole to withdraw protection.

This reasoning may with very little alteration be applied to a single member of a civil society, who, though he has committed no crime, is demanded by an enemy. Though no person has a right to leave the society, to which he belongs, unless the public either expressly or tacitly consents, that he should leave it; yet where the society is in such circumstances, that protection, which is the end of social union cannot be had, this necessity will supersede the obligation of the social compact, and will allow him to provide for himself by quitting the society. A like necessity on the part of the society, where it cannot defend itself, if it undertakes the defence of some particular person, who is a member of it, will justify the withdrawing of protection. This conduct of the society will appear the more reasonable, if we observe, that it does no damage to the individual: for if the society could not defend itself without deserting him, it certainly could not defend him, if it would.

But the notion of deserting a subject differs from the notion of delivering him into the enemy's hands. A right only to desert him leaves him at liberty to provide for his own safety as well as he can. Whereas a right to deliver him up implies an obligation on his part to submit to be delivered up, though he might be able to make his escape and to secure himself, and a right in the society to seize him by force and prevent him from escaping, till it has put him into the enemy's power.

The principle, upon which Grotius sets out in examining this question, is, that the subject whom the



enemy had demanded, is obliged to deliver up himself: and from hence he deduces a right in the society to compel him by force to discharge this duty; if he refuses to discharge it of his own accord. It would in effect be to take the point in dispute for granted, if Grotius, when he argues, from the obligation of the subject to deliver up himself, to establish the society's right of delivering him up by force, had considered this obligation as a matter of strict justice, which is due from the subject to the society. For undoubtedly the society has a right to compel the subject by force to do whatever in strict justice it can demand of him. So that to lay it down as a first principle, that the subject is under a strict or perfect obligation to deliver up himself, is the same as if it had been taken for granted, or laid down as a first principle, that the society has a strict and perfect right to deliver the subject by force. But Grotius only supposes, that it is an obligation of the imperfect sort, a duty of humanity or benevolence on the part of the subject, to prefer the preservation of a multitude to his own safety. But if this is only an imperfect obligation, we might question, whether the subject can be compelled to discharge it: for in general, where a duty is in its own nature of imperfect obligation, and there is no positive law, which has so far changed the nature of it, as to make it a duty of strict justice, the law of nature gives no right to compel the performance of such a duty. To this our author replies, that amongst equals there is indeed no right to compel any person to discharge a duty of imperfect obligation: but a superiour can of right compel an inferior to the practice of any virtue whatsoever; and this right is necessarily included in the notion of superiority. The state therefore may lawfully deliver up

the subject by force, if he refuses to discharge the imperfect duty of delivering up himself. I shall not insist upon its being uncertain, whether in such a distressed condition of a nation, as is here supposed, a powerful enemy, who makes this unreasonable demand, would be satisfied, if it was complied with : for though this uncertainty might be urged as a reason, why the subject is not obliged, even imperfectly, to deliver up himself, because by such an act he might sacrifice his own safety without preserving the society ; yet the terms of the question exclude the supposition of such an uncertainty ; since the question is not, what the society has a right to do in order to try, whether it cannot preserve itself, but what it has a right to do, when a compliance with the enemy's demand is the way and the only way to preserve itself. Nor shall I enquire how far the general law of benevolence would bind a man to give up his own life for the sake of preserving a multitude ; because this is an enquiry, which is likely to introduce much declamation on both sides and little precision on either. And it is the less necessary to enter into this enquiry ; because if we suppose this first principle of our author to be true, it will not support his conclusion. Civil superiority is a right of prescribing to the members of a society such a conduct, as is conducive to the general good, and of enforcing what is so prescribed. We must therefore allow, that where any duty, which is naturally of imperfect obligation, appears to the public wisdom to be conducive to this end, a civil society has an authority derived from the social compact to prescribe this duty by positive law : and when it is thus prescribed, it becomes a duty of strict justice, and the subjects may be compelled by force to discharge it. But though we are ready to allow this, I do not see how <sup>n</sup> Grotius can contend for it, or

<sup>n</sup> I. II. C. XX. § XX.

argue from it, consistently with himself: because his general opinion is, that no civil authority can make use of force to compel the practice of any duties, that are of the imperfect sort, and particularly to compel the practice of benevolence. His consistency however is not the matter now in hand. If the principle itself is true, he may argue from it in this question, notwithstanding he elsewhere contradicts it, provided he argues from it rightly. But this is the point, in which he fails. A civil society has authority to prescribe duties of imperfect obligation, and then to compel the subjects to observe them. But they must be first prescribed by positive laws, before such compulsion can of right be made use of: for till positive laws have made them duties of perfect obligation, they continue to be, what they were naturally, duties of imperfect obligation, and cannot be exacted by force. If therefore our author's reason, upon which he endeavours to establish the right of a civil society to deliver up one of its innocent members to an enemy, that demands him, will establish this right at all, it can only be in those societies, if there are any such, which have prescribed by positive laws, that any subject, who is thus demanded by an enemy, shall deliver himself up. You may say, that a command of the public, which is given at the very time, will stand in the place of a law, and that, if the society has a right to establish a positive law for this purpose, it has an equal right to give an occasional command for the same purpose. But this is a mistake: for what is enjoined by law relates equally to all the members of a civil society, so as to lay the same burden upon all in general: and it is merely accidental, if the law, when it comes to be put into execution, should affect only one member in particular: it had no view to him in particular, but was designed to affect all alike, whenever

° See B. II. C. V. § XIV.



they shall happen to be in the same circumstances, that he is. But the burden, that arises from an occasional command, is originally designed to be laid upon one only: and without a fresh command the like burden will not fall upon any others, even though their circumstances should happen to be the same with his. Now each member is obliged by the social compact to join with the rest in supporting the state and in advancing its welfare. But this compact does not bind any one member to pursue these ends alone, and consequently does not give the state any authority to prescribe, that any one member shall pursue these ends, by such occasional commands as oblige him in particular, and produce no obligation upon the other members, even though they should come into the same circumstances. In military service a soldier may indeed be ordered by his commanding officer to a post, which he cannot defend without the hazard, or rather without the probable loss of his life. This appears at first sight to be an occasional command of much the same sort with the command, that we have been speaking of. But a little attention will shew us the difference between them. All the members of a civil society, who have voluntarily engaged to perform military service, are subject to the military laws of it, which, however they may be distinguished by name, are part of the civil law. These members therefore are all of them obliged, as occasion requires, to hazard their lives in the same manner by maintaining such posts, as they are ordered to. And what the commanding officer does by ordering any particular person to a post of certain danger, is only a particular application of this general law. Thus the occasional command, which is given to an innocent member of a civil society, to deliver himself up to an enemy, is not

founded in any previous law, which would extend in like circumstances to all the other members, but is in the original design of it confined to him in particular. Whereas what may be called occasional commands of superior military officers are in effect only the occasional applications of such a general law to one particular person, as in its original design extends to all, who shall ever be in the same circumstances, that he is in.

The topics, that are commonly made use of in this question, are, on one side, that every person consents to become a member of a civil society with a view to his own benefit, and on the other side, that every member of a civil society is obliged to promote the benefit of the whole. But whilst I think, that a nation has no right to deliver up an innocent member to an enemy, and that the member demanded by the enemy is not obliged to deliver up himself, I do not think, that the first of these topics will establish the truth of this opinion. For the private view, which a man has to his own interest, when he enters into a civil society, is not the proper measure of the societies right over him, or of his duty towards it, after he is become a member. The social compact is a bargain between him and the society: and in this bargain, as in all others, the mutual rights and obligations, which are produced by it, are not determined by the particular view or purpose, which led one of the parties to agree to it. These rights and obligations depend upon the mutual agreement of both the parties, and consequently cannot be settled without considering the views of both. A member of any state might design to advance his own particular benefit by becoming a member: but the society no otherwise consents to this design, and no otherwise establishes it into a right on his part, or obliges itself to concur with him in it, than upon condi-

tion of his consenting to secure and advance the general good. Whatever extensive views therefore he might have of obtaining his own benefit; the extent of his right to pursue it, as he is a member of the society and under the obligation of the social compact, will depend upon the limitation, which arises from this compact, and respects the security and good of the whole. The other topic however, which is commonly made use of on the contrary side of this question, will not prove, that the state has a right to deliver up an innocent member to an enemy, who demands him. He is obliged, as he is a member of the society, to promote the benefit of the whole. But this obligation is not absolute or unconditional. The benefit, which he is obliged to promote, is a benefit, in which he is to have a share in common with all the other members, and which they according to the respective duties of their several stations are obliged to assist in promoting in common with him. And such an obligation on his part cannot give the society, which consists of all the other members, a right to compel him to advance or secure a benefit, in which he cannot possibly have any share, and towards the advancing and securing of which no member, besides himself, contributes any thing. But it is time to leave this digression and turn to the law of nations.

XIII. <sup>P</sup> The several members of a civil society are parties by the law of nations in any injury, that the society does: for this law considers such a society as one collective person: and consequently an injury, which is the act of this collective person, must in the view of this law be the concurrent act of its several parts or members.

Members of a nation are accountable for injuries done by it.

But in a perfect democracy the act of the nation is the immediate and direct act only of the majority; whilst the minority of the members, who are overruled by the majority, dissent from it. And in like



manner the act of a nation under other forms of government is the immediate and direct act of the supreme governours; whilst the subjects either know nothing of what is done, or contribute nothing towards it by their consent, or perhaps disapprove of it. How therefore can the law of nations be the same, as to the matter of it, with the law of nature: since the former law makes those parties in an injury, who have never or immediately or directly consented to it, or whose consent was of no moment in producing it? What we have <sup>9</sup> elsewhere said about the obligation of civil laws will help to explain this matter. No person is naturally obliged to any thing, beyond what the law of nature prescribes, without his own consent. But in a civil society the several members are obliged by the civil laws of it; though these laws differ in the matter of them, from the law of nature, and are established in a perfect democracy by the majority, without the direct or immediate consent, or rather against the immediate and direct declaration, of the minority. For those members, who are in the minority, have, in the social compact, which made them parts, of the society, consented to be conducted by the general act of the whole, which, if all and each of the members do not concur, is the act of the majority: and this remote or indirect consent will naturally make the act of the majority their own, without their immediate and direct concurrence. Under other forms of civil government, there is a farther act of consent, besides that, which joined the several individuals into one civil society: this society, after it is formed, agrees to vest the supreme civil power in certain governours, or to give these governours authority to act for the whole. And what such governours do, in their respective departments, is, in consequence of this remote and indirect

<sup>9</sup> See B. II. C. VI. § I.

consent of the society, the act of the society itself, and of all the members of which it consists. These compacts may in the first instance be called private [ones in respect of the great body of mankind : they are made within the society itself, and others, who are not parts of the society, are neither obliged nor have any right to take notice of them. But they become public by the general consent of mankind to consider every civil society in the same light, in which the several members of each society consider it, as one collective person, that is under the direction of the constitutional governors and that acts by these governors. This general consent is the foundation of the law of nations : and in consequence of such consent, what is done by any civil society, or by the constitutional governors of it, becomes, in the view of the law of nations, the joint act of the several members, even of those members, who have not directly or immediately concurred in the act : because by the compact, which established the civil constitution, they have remotely or indirectly agreed to whatever is done by the constitutional governors.

But an injury lays the person, who commits it, under <sup>r</sup> two obligations. One of these obligations arises from the effects, which the injury produces : it does damage to those, against whom it is committed ; and from hence the authors of it, and the accessories to it, are obliged to make reparation. The other obligation arises from the guilt of the person, who commits it, that is, from his disposition to do harm : this disposition lays him under an obligation to submit to punishment, and gives others a right to inflict it. Where an injury therefore is committed by a nation ; the collective person of the nation is bound to make reparation for damages ; and as far as it appears to have had any malicious design of doing harm, it is likewise liable to

<sup>r</sup> Grot. L. II. C. I. § II.

punishment. But it is necessary to enquire, whether all and each of the members of a civil society are by the law of nations deemed parties to the injury, which the society does, in both these respects; so that the injured nation has a demand upon each of them to make reparation for the damage, that has been done, and may likewise inflict punishment upon them separately for the guilt of the public.

We have <sup>s</sup> elsewhere shewn, that every fault, though it is of the lowest sort, will produce an obligation to make reparation, and that those, who are in the lowest degree accessories to an injury are involved in this obligation. Thus far therefore the law of nations will be a natural law, if, in consequence of the general consent of mankind to consider nations as collective persons, it charges an injury, which has been done by the public, upon the several members of the society, who are parts of the collective person; whether they immediately and directly consented to it or not. There is therefore no occasion to have recourse, as <sup>t</sup> Grotius has, to any law of nations, which is positive as to the matter of it, in order to make the goods of the members of a society answerable for the damages, that have been done by the society itself or by the civil governments of it.

" But punishment is not just, where there is no guilt; nor can any act of consent make it just by the law of nature, except such an act of consent, as is an evidence of a malicious temper, or of a disposition to do harm. Now the consent, which makes all and each of the members of a civil society parties in an injury, that the society does, is only remote and indirect. All and each have consented immediately and directly to be concluded by the act of the majority, or of the governing part. In this consent there is no guilt, or no

<sup>s</sup> See B. I. C. XVII. § XIV.

<sup>t</sup> L. III. C. II. § II.

<sup>u</sup> Grot. L. II. C. XXI. § VII.



evidence of a disposition to do harm: because a civil society is formed for such purposes, as are innocent in respect of the great body of mankind. And whatever malice or disposition to do harm may be evidenced by any act of the majority, or of the governing part; the minority, or the subjects, consents to this act only remotely and indirectly. But a remote or indirect consent, which is inferred only from the social compact, cannot consistently with the law of nature be deemed an evidence of a disposition to do harm. The law of nations therefore, which is nothing else but the law of nature applied to the collective persons of civil societies, will not allow the minority, or the subjects, to be punished separately, for what is done by the society or by the civil governours, either against their immediate and direct consent, or at least without it. All and each of the members are so far parties in an injury, which is committed by the society, as to be separately obliged to make reparation of damages: but those only, who are the authors of the injury, or have made themselves parties to it by their immediate and direct consent, can justly be punished for it separately. In the mean time the law of nations considering the whole society as one collective person allows this collective person to be punished for such injuries, as argue any guilt, or are evidences of a disposition to do harm. And though the innocent members cannot justly be punished separately for the guilt of the public, yet in the punishment of the public they will be sufferers. Nothing can justly be taken from them, which they have a right to, as they are individuals: but when the society is deprived of what belonged to it as a society, the innocent members will share in the loss, in consequence of their accidental connection with the society. <sup>m</sup> Grotius has mentioned

<sup>m</sup> Ibid.

several ways in which a nation may be punished. First, he says, it may be punished by being dissolved, which puts an end to the existence of a nation, as death puts an end to the present existence of individuals. A second way of punishing a nation is by reducing it to a province, which he compares with punishing an individual by servitude. Or thirdly a nation may be punished by depriving it of its public goods, such as the walls of its towns, its naval stores, or ships of war, or arms, or treasure; and this sort of punishment he compares with the confiscation of the goods of an individual. The innocent members of the society will probably be in a worse situation than they were before, or will be losers; when the society is punished in any of these ways. But what they thus suffer from their accidental connection with the society, is no more to be reckoned a punishment, than what one individual suffers by means of his accidental connection with another individual, who has committed a crime and is punished for it.

One nation may lawfully assist another in war.

XIV. The law of nations allows civil societies, in the same manner as the law of nature allows individuals, to assist one another in war: and whatever makes a war just in respect of the principal nation, will make it just likewise in respect of the assistant nations.

Where two nations are at war, the law of nations will not only allow a third nation to give its assistance to the party, which has a just cause of war, but may even enjoin this conduct as a matter of benevolence or humanity, if this party is too weak to do itself justice, and is in danger of being unjustly oppressed. But the duty of benevolence amongst nations, as well as amongst individuals, is of the imperfect sort, and admits of prudential considerations; provided these considerations are tempered with honesty and sincerity. As

an individual is not obliged to undo himself by his kindness towards others ; so no nation is obliged to ruin its own affairs by entering into a war in favour of another.

Express compacts will give one nation a perfect right to demand the assistance of another. But these compacts must be so construed as to make them consistent with the law of nature. A nation can no more bind itself by compact, than an individual could, to do what the law of nature forbids ; such compacts are void, as far as the matter of them is unlawful : and consequently no compact of alliance will oblige any nation to assist another in war, if the war is unjust.

There is some room to doubt, whether unsocial and tyrannical injuries, which the subjects of one nation receive from their civil governours, will justify another nation in making war upon those governours : because by the law of nations every nation is one entire and distinct body having an exclusive jurisdiction of its own, and no other nation can of right take notice of any thing, which passes within it, and relates only to its own members. Upon this account I cannot agree with <sup>w</sup> Grotius, that a war undertaken by a foreign nation in defence of the injured subjects will be just, even though the subjects had in those circumstances no right to make war for themselves. If no foreign nation has any right to take notice of what passes between the subjects and the governours of another nation ; the injuries, which the subjects suffer from the governours, can no otherwise justify a foreign nation in making war for the redress of those injuries, than as they are brought under its notice by a request from the subjects. And if the subjects have no right of resisting the governours, where they are thus injured, they can have no right to make this request ;

<sup>w</sup> *Ibid.* § VIII.



because they, who cannot lawfully make war by themselves, cannot lawfully employ another to make war for them. Grotius replies here, that where any person cannot lawfully do an act upon account of some impediment, which is merely personal and does not arise out of the nature of the act itself; this act, if it will be beneficial to the person, who is so hindered from doing it, may lawfully be done by some other person, who is not under the same impediment. Thus a minor is hindered by the personal impediment of his non-age from going to law for himself; but his guardian, who is not under the same impediment, may go to law for him. And in the case now before us, the impediment, which makes it unlawful, if it is unlawful, for subjects to make war in defence of themselves against the tyranny of their governours, is merely personal, and does not arise out of the nature of the act: for in general an injury is a justifiable cause of war; and it is nothing but the merely personal relation between the subjects and their governours, that can be supposed to render such a war unlawful to them. But the general principle, upon which our author here proceeds, cannot be applied to this question without a restriction. Where one person cannot do an act upon account of some impediment, which is merely personal; it is no otherwise lawful for another person, who is not restrained by the same impediment, to do this act for him than upon a supposition, that this other person is not restrained by some other impediment. If the subjects in any nation could not lawfully resist the injuries of their governours, the impediment, which makes such resistance unlawful, would indeed be merely personal; and a foreign nation is not restrained from making war in their behalf by the same impediment. But there is another impediment in the way of this foreign nation: it is restrained by the law of nations from taking notice of any thing, that passes in a society

ciety, which is distinct from it, and has a jurisdiction within itself. This impediment cannot be removed without the request of the injured subjects: and such a request could not lawfully be made, if the subjects had no right of resistance: for here their personal impediment takes place, and what they cannot lawfully do for themselves, they cannot authorize another to do for them. Thus the law of nations hinders the foreign nation from taking up arms for the injured subjects upon its own motion; and if the subjects have no right of resistance, there would be a personal impediment in their way, which would hinder them from calling it in to make war for them.

But upon supposition, that the injured subjects in any society have a right to resist the tyranny of the civil governours; as these subjects will have a right to make war for themselves, so they will likewise have a right to solicit and to procure all the assistance, that they can. And when a foreign nation is thus solicited to give them its assistance, the law of nations will not stand in its way. For this law regards civil societies only so far as they are collective bodies of men united by a social compact, and invested by means of this compact with civil jurisdiction. But the subjects have then only a right of resistance, when the social compact is broken, or in such cases, as civil jurisdiction does not reach, The law of nations therefore takes no notice of these cases: they only fall under the notice of the mere law of nature; and this law will not hinder any person from giving assistance to any other, who is injured.

XV. We have \* seen, that a solemn war is called a just one according to the law of nations, because it comes up to the highest notion of war, in the view of the law of nature applied to civil societies as to moral persons, or is a perfectly public war; and not because

What is  
lawful in  
war.

\* See § X.

it produces any effects of right by a positive law of nations. The peculiar effects, which <sup>y</sup> Grotius supposes to be confined to a solemn war, and to arise out of such a positive law, are impunity for what is done and property in what is taken. If we would endeavour to justify all, that nations do in war, and all the claims, that they pretend to derive from it ; we must indeed have recourse to a positive law of nations, which is not only different from the law of nature but contrary to it. But instead of forming a law out of their practice, in order to justify the practice itself, it is more reasonable to enquire how far these two effects are produced by the only law of nations, that has any real foundation, that is, by the law of nature, as it is applied by positive consent to the collective persons of civil societies. And perhaps in the course of this enquiry we shall find, that these effects, as far as they are consistent with reason, are not confined to solemn wars only.

The law of nature has not precisely determined, how far an individual is allowed to make use of force, either to defend himself against an injury, which is attempted ; or to obtain reparation of damages, where he, who did the damages, refuses to make reparation ; or to bring an offender to just punishment, where he holds out against it. What we can collect from this law is only this general rule, that such use of force, as <sup>z</sup> is necessary for obtaining these ends, is not forbidden. If instead of supposing one individual to be acting against another in the pursuit of these ends, we suppose a number of individuals to be occasionally combined on each side, the rule will still be the same : whatever one individual might lawfully do against another ; a number of individuals on one side may lawfully do the same against a number of individuals on

<sup>y</sup> L. III. C. IV. § III. C. VI. § I.    <sup>z</sup> Grot. L. III. C. I. § II.



the other side. The difference, between two such parties of individuals and two nations, depends upon the positive and general consent of mankind to consider every nation as a collective person or moral agent. In a number of individuals, who occasionally combine together, no one is a party in any act, unless he consents to it or joins in it immediately and directly: whereas by the law of nations each of the members of a nation is a party in the act of the supreme governours, without such immediate and direct consent. Upon this principle a whole nation and each of its members may lawfully be treated as enemies in a public war. But it does not follow from hence, that all the members may be lawfully treated alike: though we may lawfully kill some of them, it does not follow, that we may lawfully kill any of them without distinction. For the general rule, which is derived out of the law of nature, is still the same: no other use of force is lawful, besides what is <sup>a</sup> necessary. We have therefore no right to take away the lives of those parts or members of the adverse nation, that we can get into our power, without proceeding to this extreme use of force. The law of nature does not forbid the killing of those who are actually in arms against us, and cannot be reduced into our power by any other means. But if an army, or any small parties of an army, come into the territories of the enemy, notwithstanding they are at liberty to treat the <sup>b</sup> inhabitants, who are not in arms, as enemies, yet they have not a general liberty to kill them. The plain reason, why they have not this general liberty, is, because the death of the inhabitants, who are not in arms, is not necessary for obtaining the just ends of war: and all harm, which exceeds what is necessary, is causeless harm. Even they, who are in arms, whether they are the standing armed force of

<sup>a</sup> Grot. L. III. C. XI. § II.      <sup>b</sup> Grot. ibid. § IX. X. XII.

the hostile nation, or any of the other members of it, who arm themselves occasionally, cannot lawfully be killed, if they quit their arms, and surrender their persons. It may be necessary, when they are thus in our power, to guard against any future opposition, that they might make to us, by taking their arms from them; or by compelling them to give security, that they will not bear arms against us for a certain time, or during the continuance of the present war; or by making them prisoners. But if their life can be spared, without defeating the just ends of war, we have no right to take it away. In the siege of a town, many of the inhabitants, who are not in arms, may happen to be killed. This is such a chance of war, as the law of nature will excuse. For if the act of besieging the town is lawful, the accidental consequences, which follow from taking the necessary steps to carry on this act effectually, are not chargeable upon the besiegers. The inhabitants, as they are members of the adverse nation, may be treated as enemies: and though the law of nature would forbid this harsher kind of hostile treatment, if their was an opportunity of obtaining our lawful purpose without it; yet where it was not principally designed, and was made necessary by accident, this law does not condemn it.

The exceptions to this rule of not killing these persons, who never were in arms at all, or who, though they have been in arms, have surrendered themselves are very few. If they are considered as members of the nation, with which we are at war, nothing more is necessary in the first instance, than to get them into our power. The law nature therefore will not allow us to go farther. But if they, whom we thus get into our power, have been guilty of any previous crime, for which they deserve death, this law does not forbid us to inflict this punishment, any more than if they

and we were members of no society at all, but were still in the original state of nature.

<sup>c</sup> The obstinacy of holding out long in a siege is not one of these crimes : for a discharge of their duty towards their own nation is not in its own nature a crime against the other. There might perhaps be some advantage in putting a garrison to the sword for holding out long : as such an example might be a means to deter others from giving the besiegers the same trouble. But neither this nor any other motive of mere utility, will render it just to take away the lives of those, who are in our power, and have not deserved to lose them. Neither is retaliation a justifiable cause for killing prisoners of war : though our adversaries should have killed the prisoners, whom they have taken from us, this will not justify us in killing the prisoners, whom we have taken from them. The law of nature allows of retaliation, only where they, who have done harm, are made to suffer as much harm as they have done. But to kill such prisoners of war, as are in our power, because the nation to which they belong, has treated our countrymen in this manner, would be to do harm to one person, because harm had been done by another. An injury, which is done by a nation does indeed communicate itself to all the members of that nation ; and such a communication of guilt is all, that can be pleaded for the retaliation, of which we have been speaking. But <sup>d</sup> Grotius very truly replies here, that to punish captives or prisoners of war in this manner would be to punish them in what is their own as individuals : whereas the national guilt can only be communicated to them, as they are members of the offending nation : and consequently the proper punishment of it should only be inflicted on them as they are members of the offending nation, and not as they are

<sup>c</sup> Ibid. § XVI.

<sup>d</sup> Ibid.



individuals. If retaliation is not a just cause for killing prisoners of war, much less will it be a just cause for killing hostages. Those persons, who are put into our hands as hostages, become pledges by their own voluntary act for the performance of something, which their nation has engaged to do. But by their own voluntary act they can pledge only what is in their own power to dispose of. They may give up their liberty as a security for the fidelity of their nation: but their lives, though they are their own to keep, are not their own to dispose of, and consequently cannot be given in pledge.

The reason, why the act of holding out long in a siege is no personal crime in them, who hold out, has already been hinted at. This reason will conclude more strongly in favour of those, who have only borne arms, and have given us no more than the common opposition of war. The members of a civil society are obliged in general, and those members, that have engaged themselves in the military service of it, are obliged in particular, to take up arms and to fight for it at the command of the constitutional governours, in the defence and support of its rights against its enemies from without. There is no crime in entering into the social compact. from whence the general obligation to bear arms for these purposes is derived. This compact as it only binds the several members of the society to pursue the ends of civil union, is innocent in respect of the rest of mankind. And if there is no crime in this compact, which would bind all the members alike to discharge the duties of war, there can be no crime in a particular compact, by which some of the members undertake to discharge the same duties, instead of the rest. The consent, by which the subjects in general, or the soldiery in particular, lay themselves under these

obligations, is the only act, that can by the law of nations be looked upon as a personal act of the individuals, who bear arms. In consequence of the general consent of mankind to consider nations as collective persons, whatsoever is done by the members of a nation at the command of the public or of the constitutional governours, who speak the sense of the public, is the act of the nation: and if the act is unjust, the guilt in the view of the law of nations is chargeable upon the nation, and not upon the individual members. I am now speaking not of what will justify a man, who bears arms in war, to his own conscience, but of what will justify him to the nation, against which he fights at the command of the nation, to which he belongs. If the war is plainly and notoriously unjust, the obligation of the social compact, or of any other compact, will not justify him to his own conscience: because no compact whatsoever can bind him to do, or excuse him in doing, what the law of nature forbids. And if he was to fight as an independent individual, at his own choice and upon his own motion; those, against whom he fights, might look upon the act of bearing arms against them in such a war as a personal crime. But when they, with all mankind, have agreed to consider the several members of a civil society only as parts of a collective person, that act under the direction of the common will of such collective person; however inexcusable a man, who fights against them, might be, in the view of his own conscience, or of the law of nature, which considers him as an individual, they cannot consistently with this agreement, that is, they cannot consistently with the law of nations, charge him with having been guilty of a personal crime merely upon account of his having fought against them.

Thus far therefore I agree with Grotius, that some acts are lawful in war by the law of nations, which by

the law of nature would be unlawful; and that this lawfulness consists only in impunity, or that it is only external in the view of mankind, and not internal in the view of conscience. But though I agree with him thus far, I differ from him in three particulars. First; this impunity does not arise from a law of nations, which is purely positive, but from the positive consent of mankind to apply the law of nature to civil societies, as if each society was a distinct moral person made up of its several members. For though the law of nations does in this instance grant impunity, where the law of nature would not grant it; yet this difference arises only from the difference of the persons, to which the same law is applied. The law of nature applied to individual persons would make it a crime, not only in the view of conscience, but likewise in the view of mankind, to fight in an unjust war. But when mankind have agreed to keep individuals out of fight, as it were, and to apply this law only to collective persons; they cannot consistently with this agreement charge the parts of these collective persons with any separate guilt, for what is done under the direction of the common or collective will. Secondly; this impunity for what is done in war is confined to the acts of the separate members of civil societies, and does not extend to the corporate acts of the societies themselves. How far what nations do collectively obtains impunity by the law of nations will appear hereafter. But we may observe here, that, if this law is nothing else but the law of nature applied to the collective persons of civil societies, no acts, which could not be done by individual persons consistently with the law of nature, can be done by collective persons consistently with the law of nations. Thirdly; Grotius confines the external lawfulness of what is done in a war, which is internally unjust, to solemn wars only: whereas this



external lawfulness in respect of the members of a civil society extends to public wars of the imperfect sort, to acts of reprisals or to other acts of hostility. By giving the name of public war to reprisals or other acts of hostility, which fall short of being solemn wars, I suppose the reprisals to be made, or the acts of hostility to be committed, by the authority of a nation, though it has not solemnly declared war. For if the members of the nation make reprisals, or commit acts of hostility, without being thus authorized, they are not under the protection of the law of nations: as they act separately by their own will, so they are separately accountable to the nation, against which they act.

<sup>e</sup> Prisoners of war are indeed sometimes killed; but this is no otherwise justifiable, than as it is made necessary either by themselves, if they make use of force against those, who have taken them, or by others, who make use of force in their behalf, and render it impossible to keep them. And as we may collect from the reason of the thing, so it likewise appears from common opinion, that nothing but the strongest necessity will justify such an act: for the civilized and thinking part of mankind will hardly be persuaded not to condemn it, till they see the absolute necessity of it.

The same general rule, by which we are to guide ourselves in judging, how far it is lawful to destroy the persons of our enemies in a public war, is the rule, by which we must be guided in judging, how far it is lawful to ravage or to waste their country. If this is necessary to be done in order to bring about the just ends of war, it lawfully may be done; but not otherwise. Thus if the progress of an enemy cannot otherwise be stopped, we may destroy the forage or other provisions, that are in the way: or if towns or villages would afford them such posts, as would give them

<sup>e</sup> Grot. L. III. C. XII. § I.

a considerable advantage against us, and we cannot otherwise prevent them from gaining these posts, we may destroy such towns or villages. To waste a country, unless for some such necessary reasons as these, is causeless harm.

Under the notion of wasting or ravishing a country I do not include plundering it: this may possibly not be causeless harm; because they, who plunder it, may acquire the goods, which they take from the enemy: and if the law of nature will give them property in the goods, which are so taken; the same principle, upon which such property is acquired, will justify the act of taking them.

I shall not detain the reader here with a particular enquiry, how far fraud is lawful in war. The general principles, upon which questions of this sort are to be determined, have been stated <sup>§</sup> already.

These rules, which are derived out of the law of nature applied to the collective persons of civil societies, are represented by Grotius as temperaments, by which the law of nature qualifies and abates the rigour of a purely positive law of nations. He grants, that they are such rules, as a nation must observe, if it regards what is intrinsically just; but contends, that there is a positive law of nations, which allows a greater license, and gives an extrinsic justice to what is done in solemn wars, though these rules are exceeded. We have already seen, that there is no cause, or no legislative power, by which such a law could be produced or established, and may now enquire, whether the effects of such a law can be traced out in any extraordinary license, which is peculiar to solemn wars.

No evidence of such a law appears in the name of just war, which is usually given to wars of this sort, whether they are internally just or not. For the name

<sup>§</sup> See B. I. C. XIV. § III. IV.

of just war, as it is appropriated to solemn wars, without regarding the causes, upon which they are moved, is not intended to denote any external justice, which a purely positive law of nations allows promiscuously to all such wars; it is only intended to denote, that such wars are perfect in their kind, or come up to the highest notion of a war of nations.

In the practice of nations, that are at war with one another, all rules, which arise out of the law of nature, are indeed sometimes exceeded. The slaughter, which the army of a nation makes amongst its enemies, is not always confined to those, who are in arms, or to those, whose lives cannot be spared consistently with its own safety. Sometimes no quarter is given to such as surrender themselves; when it is not necessary to take away their lives. Sometimes prisoners of war are killed in cool blood; when there is no danger of their being rescued, or of their rising in arms against those, who have taken them, and have them in their power. Sometimes in what are called military executions, not only the inhabitants of an enemy's country, who are able to bear arms, though they never were in arms, are murdered, but the slaughter is extended to women and children. But though these and other enormities are practised in war; it is no consequence, that there is any positive law of nations, which makes them lawful.

One evidence, which <sup>h</sup> Grotius produces of such a law is, that, however criminal these practices are by the law of nature, they meet with no punishment amongst nations, and that this general license of transgressing the law of nature in war extends to all solemn wars whatsoever, even to such as are internally unjust, in which the law of nature is so far from allowing outrageous or unnecessary force, that it does not allow the use of

<sup>h</sup> L. III. C. IV. § IV.



any force at all. The use of any force in an unjust war, and the use of outrageous and unnecessary force in any war, is criminal by the law of nature ; and neutral states, or states, who are not concerned in the war, might, if this law was the rule, by which nations are guided in their conduct towards one another, punish the offending nation for such criminal uses of force. But since in solemn wars these criminal uses of force obtain impunity, that is, since neutral states do not interpose to punish a nation that is guilty of them, Grotius concludes, that such wars, however unjust they may be either in their internal causes, or in the manner of carrying them on, have an external justice in the view of nations, which can only be given them by some purely positive law. The principle point to be considered here is ; whether this is only an impunity in fact or whether it is an impunity of right. Though neutral states do not in fact interpose to punish such uses of force in war, as are internally criminal by the law of nature ; it is no consequence, that they have no right to interpose. There is a prudential reason which will operate in this matter as universally as a law. Neutral states cannot punish the injustice of what has been done in war without engaging themselves in a war with the state, which they undertake to punish. And an impunity, which thus arises in fact from the regard, that every neutral state has to its own safety, is no evidence of a positive law, which has given an external rectitude to whatever is done in solemn war, and has established a right to such impunity.

Grotius, when he mentions this prudential reason, considers it, not as the immediate cause, which restrains neutral states from punishing what has been done unjustly in a solemn war, but as a general mo-

tive, which induced all nations to lay themselves under such a restraint by a positive law. If the regard, which neutral states have to their own safety, is the immediate cause of this restraint, it is only a restraint in fact; they are at liberty to judge for themselves, how far it is consistent with their own safety, or conducive to their own interests, to intermeddle in the quarrels of other states, and are farther at liberty to act upon this judgment, either to intermeddle or not, as they think proper. But if it is only a general motive, which induced all nations to establish such a restraint by a positive law; they will then be under a restraint of right; and whatever their own interest may either allow of or recommend, they will be obliged to overlook whatever is done by other nations in a solemn war, whether it is internally just or not.

Whilst a war is depending, which either is naturally unjust in the causes of it, or is carried on by such outrageous and unnecessary acts of violence, as are naturally unjust; there can be no doubt about the right of a neutral state to declare to the wrong doers, that it will join with the sufferers, or about its rights to put this declaration in execution; unless the unjust war is put an end to, or the unjust means of carrying it on are corrected. The civil governours of a neutral society may indeed in one respect be said to be restrained of right by what I have here called a prudential reason. They are obliged of right not to hazard the safety of their own society in the quarrel of another. But this restraint arises naturally from social union, and from the trust, which is committed to such governours, and not from any positive law of nations; it is an obligation, which regards their own society only, and has no relation at all to any other civil society whatsoever.

I am aware, that the interposition of a neutral state, whilst a war subsists, to check what is done in it against the rules of natural justice, is capable of being considered rather as a defence of the sufferers, than as a punishment of the offenders. But it is not worth the while to debate, which of these two is the true nature and primary intention of such an interposition. For if we allow it to be only a defence of the sufferers, it will be an evidence, that there is no positive law of nations, which gives an external justice to whatever is done in a solemn war. If there was any such law, nothing, which a nation suffers in a solemn war, could be externally unjust in the view of other nations; and consequently no neutral state could consistently with such a law interpose to defend the sufferers. Since no person can lawfully be defended against what he suffers justly; it would be as contrary to the notion of this external justice, to defend those, who suffer in a solemn war what is inconsistent with natural or internal justice, as to punish those, who in such a war do what is inconsistent with it.

After a war is ended by the consent of the parties, who were concerned in it, there is some appearance of a law, which restrains neutral states from taking notice of what has been unjustly done on either side, whilst the war lasted. It would in the common opinion of mankind be thought no very justifiable reason, why one nation should make war upon another, that the latter had done something unjustly in some war with a third nation, which is now at an end, and in which the former, whilst it lasted, was no way interested. But there is no occasion to have recourse here to a positive law of nations. The law of nature favours peace, and will therefore readily presume, that no injustice has been done, or that all injustice which has



been done, is made amends for, where the parties, who were concerned in a quarrel, have adjusted the matter, that was in dispute between them, to their own satisfaction. Grotius mentions another reason, why neutral states have no right, after a war is over, to take notice of any natural injustice, that has been done in it on either side. But it is a reason, which is founded in nature, and will operate as a law without the aid of positive institution. When the parties in a war are reconciled to one another, so that no complaint is made on either side; neutral states cannot have such evidence of what has been unjustly done in the war, as will warrant them to inflict punishment for what has been so done. The same hurt, which would be causeless and unjust by the law of nature, if it was done even in war designedly or out of choice, is allowed of by this law, if it was accidental or necessary. Without a fuller and clearer insight therefore, than neutral nations can have into the causes and occasions of what has been done in a war, after the parties in it are agreed, they cannot determine, whether it has criminally exceeded what the law of nature allows of, and is punishable or not.

But whether the impunity for what a nation does in war is an impunity in right or only in fact, it does not seem in the practice of mankind to be peculiar to solemn wars. For it is as unusual for neutral states, which are not concerned in a quarrel between two nations, to punish either of them for what has been done, when the war, which they make upon one another, is imperfect, as when it is begun with the solemnity of a declaration.

The second evidence, that Grotius produces, of a purely positive law of nations is, that in solemn wars some practices are not allowable, which the law of na-

ture does not forbid. The law of nature, where it allows us to take away the life of any person, prescribes, says <sup>i</sup> Grotius, no particular manner of killing him, but leaves it indifferent, whether we kill him by some open means, which he may be aware of, or by the secret means of poison or of assassination. But the law of nations, at least the law of more civilized nations, forbids the use of poison against an enemy in solemn war. An observation, which our author here makes upon the permission of the use of poison in the law of nature, will help to explain this matter. It is generous to give any person, whose life we have a right to take away an opportunity of defending himself: poisoning therefore, which gives him no such opportunity, is a less generous way of killing him, than an open attack. However, if he has deserved death, the favour of giving him an opportunity of defending himself is not due to him in strict justice. What Grotius here says about deserving death wants to be explained. A criminal, who is by the civil law justly sentenced to die, is properly said to deserve death: and as the law of nature does not prescribe, so there is not, I presume, any natural principle of generosity, which recommends, one sort of death, rather than another; except only that humanity suggests, and the law of nature requires, this punishment to be inflicted without any unnecessary torture. In like manner an individual may in a state of natural equality have committed such a crime as to deserve death for it: and where he has thus deserved to die, they, who undertake to inflict the proper punishment upon him, may, consistently with strict justice and with generosity too, put him to death in any manner, provided they observe the same caution about not giving him unnecessary torture. But in a public war the soldiers, against whom we fight, are not guilty of any capital

crime in what they do, and deserve death no otherwise, than as they stand in the way of the execution of our right, and cannot be put out of the way, or be brought into our power, without it. And thus, notwithstanding it is indifferent by the law of nature, in what manner a person, who has deserved death, is killed, whether by poison or by open force; it does not follow, that they, who fight against us in public war, may lawfully be killed in any manner. In fighting upon the authority of their state, they commit no capital crime and do not properly deserve death. Humanity therefore requires, that we should not put them to death at all, if we can obtain the lawful purposes of war without it; and generosity recommends it to us rather to run some hazard of our own lives, than to take away their's unnecessarily. But by poisoning them, we put them to death at all events, whether it is necessary or not, that is, we take away their lives, without trying whether we cannot spare them and yet put such a stop to their opposition, as to obtain the lawful purposes of war. From hence likewise we may understand, why the use of poisoned weapons should be more inconsistent with the law of nations, than the use of other weapons; not because there is any purely positive law of nations, which forbids the use of such weapons, but because it is forbidden by the natural law of humanity and generosity: for other weapons, though they may probably bring death, do not bring it so certainly as these, and leave even the wounded a chance of escaping with life.

In the business of assassinating the commanders of an army, or other leading persons of a nation, with which we are at war, we may distinguish with <sup>k</sup> Grotius between the persons, who are employed in it, whether they are subjects of our own nation, or of the other. If they are our own subjects, the act cannot

<sup>k</sup> Ibid. § XVIII.



be defended upon his principle, which is, that we may lawfully kill an enemy wherever we find him, and that it makes no difference as to the lawfulness of our act, whether it done by many or by few, by a whole army or by a single person. But the first part of this principle is not true: the only right that we have in public war over the persons of our enemies is to lay them under such restraints, as are necessary to prevent them from opposing us: since therefore in order to prevent such opposition it is not necessary to kill any, who are not in arms; because they are in our power and we can restrain them by other means; the consequence is, that we have no right to kill an enemy wherever we find him, unless he is in arms and resists us by force. Thus the lawfulness of assassination in public war will at least be confined to those, who are in arms, and cannot be extended to any other persons of the adverse nation. In respect of those, who are in arms, such as the general of an army, or some other principle commanders in it; though the persons, whom we employ, are members of our own nation, all that can be said to defend assassination in point of generosity is, that such commanders either are or ought to be upon their guard against attempts of this sort; and when they are engaged in opposing force to our lawful demand, there can be no great want of generosity in taking away their lives by such means, as it is their particular duty to be aware of and to guard against. But if we employ their own people, there is nothing to be said in excuse for the act: it is killing of them privately in such a manner, as they cannot be supposed to guard against, and may in this respect, as to the want of humanity and generosity, be resembled to poisoning: and as the act is unjust in the persons, who are employed, this injustice will be communicated to us, who make ourselves parties in it by employing them.

XVI. In a war, which is internally just, as a nation may take the persons, so likewise it may seize upon the goods of the enemies either moveable or immoveable, as far as such seizure is a necessary means of bringing them to do what is right. But what is seized only for this purpose does not become the property of the captors: the possession is just, till the purpose, for which the goods were taken, is answered; but as soon as the claims of the injured nation are satisfied, the justice of the possession is at an end.

Property  
how ac-  
quired in  
war.

There are however three ways, by which a nation in a just war may acquire property in the goods, which it takes from its enemies. First a nation, that has been injured, has a right to reparation of damages. Reparation is made according to the law of nature, not only by recovering the thing, which we are unjustly deprived of, but likewise, where the very thing cannot be had, by recovering an equivalent out of the goods of the person, who has deprived us of it. And by the law of nations this right to obtain an equivalent extends to the goods of all, who are members of the nation, that has done the injury; not <sup>1</sup> because the goods of private subjects are by any purely positive law made pledges to all the world for the good behaviour of the nation or of its constitutional governours; but because, by the positive consent of all mankind, the nation, though it consists of many individuals, is considered as one collective person; and in consequence of this general consent all the members of this collective body are deemed parties in any injury, which the body does, as far as this injury produces a claim to reparation of damages in those, against whom it is committed. <sup>m</sup>If a nation makes war to recover reparation of any damages, that have been done to it; this

<sup>1</sup> Grot. L. III. C. II. § II.

<sup>m</sup> Ibid. C. XIII. § II. III.

claim to such goods, as are taken in the war, takes place from the beginning of the war, to the extent of these damages. But if the enemy begins a war causelessly, and the nation, which defends itself, has suffered no injury from the enemy before the war began, this claim does not take place from the beginning; because the nation can have no right to an equivalent, where it has sustained no damage. However, this claim, though it did not begin with the war, will arise in the progress of it: for the war itself is an injury; and consequently the nation, against which it is made, will have a right to reparation for all the damages, which are done to it in the war.

Secondly; a nation has a right to be paid the expences, that it makes in a just war. These expences are indeed so many additional damages: for whatever the nation is forced to expend in recovering its right, is a loss, which is occasioned by the fault of the enemy, who withholds that right. As the nation therefore acquires property in the goods, which it takes from the enemy, to the amount of the original damages, that occasion the war, and of the fresh damages, that are done in the war; so upon the same principle it acquires property in what it takes as an equivalent for the current expences, that are made in carrying on the war.

Thirdly; a nation, which has committed a crime, may be punished, in the same manner with an individual, in the liberty of nature, by being deprived of its goods. But whilst the offending nation thus loses its goods, the nation, that takes them, will acquire property in them no otherwise, than either by being the first occupants, or by receiving the goods as a ransom, by which the offending nation redeems itself from some other punishment. Grotius confines this way of



acquiring property in war to such goods only, as belong either to the collective body of the state or to the criminal members of it. And this restriction is a very proper one : for though an injury, which is done by a nation, is communicated to all the members of it, as far as this injury produces an obligation to repair damages ; yet the guilt of it, as it implies a disposition to do harm, is confined to the collective person of the nation, and to those particular members of it, who have made it their own act by their immediate and direct consent.

Grotius agrees, that these are the proper measures of what can be acquired in war by the law of nature. But <sup>n</sup> he contends at the same time, that in this instance there are plain traces of a positive law of nations, which extend the right of war. For in the approved practice of nations, or at least in such practice, as is not condemned, whatever is taken in war is the property of the captors, though it is more than an equivalent for any damages, that have been done, or any expences, that have been made ; and this claim of property is not confined to such wars, as are internally just, but is extended to all solemn wars whatsoever, whether they are internally just or not.

But here we are apt to mistake a right, which arises from the consent of a nation, whose goods we have taken in war, for a right, which a positive law of nations gives us to those goods, merely because we have taken them. Though we had no just claim to them from the first, yet when we make peace with the nation, from which they were taken, if they, or an equivalent for them, should not be demanded, they become our own by the tacit consent of that nation, without the aid of any purely positive law of nations. The surest way of trying, whether it is the claim of war, or the claim of a tacit consent in concluding a

<sup>n</sup> L. III. C. IV. § II.

peace, which gives us property in all such goods, as are taken in war, is to enquire what sort of a right we have to them, before peace is concluded. There is no law of nations, which forbids our enemies to continue a war, when no other cause of dispute remains, besides our detention of such goods, as we have taken in the war, beyond an equivalent for damages and expenses. As the law of nature will allow this to be a just cause of continuing a war; so there is no practice of nations, and no general opinion of mankind, that determines otherwise. But if any law of nations had given us property in such goods, the same law must necessarily condemn the adverse nation, for continuing a war, merely because we would not give them up: for the design of such a war would be to take from us what the law of nations had made our own. This opinion, that all goods, which are taken in war, are not strictly our own by any law of nations, till peace is concluded, that is, till some consent either express or tacit has made them our own by the law of nature, seems to be the general opinion of mankind in respect of immoveable goods, such as fortified towns, which have been taken, or provinces, which have been over-run in war. The captors are looked upon, whilst the war lasts, to be only in possession of them: and though this possession may help them to make a better bargain for themselves in a treaty of peace, than they could do otherwise; yet the property, which they have in things of this sort is deemed to be precarious, till a treaty of peace has ascertained and established it. It is usual in treaties of peace to mention such immoveable goods particularly; and the captors, if they acquire property in them, acquire it by express consent. We may therefore reasonably conclude, that the property, which the captors have in all moveable goods taken in war, is like-

wife acquired in the same manner. The only difference is, that immoveable goods are generally of the most importance, are in the hands of the public, and can readily be returned ; whilst moveable goods are of less consequence, are in private hands, and, because they have either been consumed or have not been kept together, cannot be returned so readily. For this reason, whilst the property in the former is adjusted by express consent, the property in the latter is left to pass from the original owners to the captors by tacit consent.

The law of nature, which thus gives the captors property in what they have taken in a solemn war, either as an equivalent for damages and expences, or by consent of parties, will likewise give them property by the same means in what they have taken in the less perfect kinds of public war, in reprisals or in other acts of hostility, which do not come up to the notion of solemn war, for want of a declaration of war : the captors acquire a natural right in an equivalent for their damages and expences : if they have a natural right to any thing more, it must be acquired either by the express or the tacit consent of the nation, from which the goods are taken. And it will be difficult, either in the practice of nations or in the general opinion of the thinking part of mankind, to find any positive law, which will prevent the captors of goods in these imperfect wars from acquiring property in them by these means. It is not more useful for neutral nations to interpose in order to compel the captors to restore what they have taken in imperfect wars, than it is for them to interpose for the same purpose, where the goods of one nation have been taken by another in a solemn war. The parties concerned seldom meet with any obstructions from without in making the best bargain for themselves, that they can, in either sort of war : and



whatever we may hear said about a purely positive law of nations ; they are left to guide themselves by no other law, besides what obliges all nations, or rather the governours of all nations, in conscience, and that is the law of nature applied to the collective bodies of nations as if they were moral agents. It will be nothing to the purpose to urge, that whatever neutral nations may do, the nation, with which we are concerned, will enforce a positive law of nations, and if we have taken any thing from it in the way of reprisal, without declaring war, will not make peace with us again, till we have restored what was so taken or an equivalent for it. For this with very little variation may be said of what is taken in a solemn war : the nation, from which we have taken it, if it has strength enough to support itself, will be no more willing to make peace with us, till we have returned the towns, or the ships, or the other goods, that we have taken from it in a solemn war, or an equivalent for them than if we had taken the same towns, or ships, or other goods in the way of reprisal without declaring war.

In what I have here said about the captors of goods in war, I would be understood under the name of captors to mean the nation, which takes them : for whether the goods so taken, when property is acquired in them, are the particular property of the individuals, who take them, or the general property of the nation, of which these individuals are members, is a distinct question : and it belongs rather to the civil law, than to the law of nations, to determine this question. Certainly no purely positive law of nations can naturally determine it : because whatever other nations may have agreed upon amongst themselves ; the laws, which regulate the mutual rights of each particular nation and its own members, must come from the nation itself. If

in any particular nation the claim to what is taken in war has not been adjusted by any written law, or by any custom, which is an unwritten law, or by any occasional grants, we may reasonably enquire, how it ought to be adjusted upon such principles as are founded in civil union. Since every member of a civil society acts in a public war as a part of the community, and not separately as an individual, that is, in the right or upon the authority of the whole, and not in his own right, or upon his own authority, the natural consequence is, that, whatever he acquires, it is acquired for the community and not for himself. ° Grotius makes a distinction in this matter between public acts of war, and private acts, to which the war gives occasion. He allows, that the acquisitions, which are made by acts of the former sort, though they are made by means of private persons, are made for the public; because the private agents are here only the instruments of the public: so that whatever is acquired by them, it will accrue to the public, in the same manner as what is acquired by those persons, whom any man employs to do work for him, accrues to him, who employed them, and not to them, who do the work: it is his own work, though he does it by others, who are his agents; and consequently the fruits or profits of the work belong to him. But as soldiers may get possession of the goods of the enemy, whilst they are in battle, or whilst they are doing what the state has commanded them to do; so they or other individual members of the state, may have opportunities of taking the goods of the enemy, where they are not acting under any immediate command of the state. When they are thus annoying the enemy by the general right of war, it is our authors opinion, that the captures, which they make, are their own. But this distinction between

° L. III. C. VI. § VIII. IX. X. XI. XII.

what is done in the immediate service of the state, and what is done out of this service by the general right of every member of the state to annoy the enemy, has no foundation in public war. For as public wars begin from the authority of the state, so they are carried on by its authority: every member therefore of the state, who acts at all in such a war, acts as a part of the whole, and under the authority or in the right of the public: he is an agent for the public, or acts in the service of the state, whether he has received any express command for what he does, or acts at his own discretion, as he sees opportunity: the only difference is, that in one case he acts by a particular commission, and in the other case [by a general one.

Grotius allows, that the rule, which he draws from this distinction, admits of one exception. Whilst he contends, that what is taken in war by any members of a civil society, is the private property of the captors, if they were acting only by the general right of war, and not under any immediate command of the society; he confines this rule to moveable goods; because immoveable goods, such as provinces, or towns, or whatever other things adhere to the soil and are parts of the territory, are not usually taken, and cannot usually be kept, without armies and garrisons. But if the rule itself was true; the reason, upon which he supports this exception, would not extend the exception universally to all immoveable goods, by what means soever such goods are taken. For though it may be more difficult for private persons to take and to keep provinces or towns, than to plunder some few of the inhabitants, and to seize their moveable goods; yet this is only a bar in fact, and not a bar in right, to the claim of private captors to what adheres to the soil and is a part of the enemies territory. Private persons will more sel-



dom be able to take and to keep immoveable goods, upon account of this difficulty. But if in fact they have ever overcome this difficulty, and have been able to take and to keep them without an army or a garriſon acting under the immediate and particular commiſſion of the public, they will then have a right to theſe ; if in the like circumſtances, they would have any right to moveable goods.

But there is a general reaſon, why all goods, which are taken in war, ſhould accrue to the ſtate, and not to the private captors ; whether the captors act under a particular commiſſion, or only under a general commiſſion, from the public ; and whether the goods are moveable or immoveable. The goods ſo taken are not ſtrictly appropriated either to the ſtate or to the private captors, whiſt the war continues : the property in ſuch goods is precarious, till a treaty of peace has eſtabliſhed it. In the mean time as the ſtate is answerable for them to the enemy, it is natural, that this precarious property ſhould be veſted in the ſtate, that is, that the ſtate ſhould have the cuſtody of the goods. And as the effect of a treaty of peace is only to give the full property of the goods to thoſe, who had the cuſtody of them before ; the full property will by this means accrue in the end to the ſtate itſelf.

I have here ſpoken of the property of all goods, which are taken in war, as ultimately transferred by conſent in treaties of peace, without having any regard to what is taken for damages or for current expences. As to expences, whatever a private perſon, who is not immediately retained in the ſervice of the public, lays out in a public war, whiſt he is carrying on ſome particular deſign of his own, this is all expended voluntary and not through the fault of the enemy : ſo that this expence gives him no private claim upon the

enemy's goods. The case of a claim to an equivalent for damages done is rather more intricate : because the damages, for which a compensation is due from the enemy, are sometimes such as have been done to the state, and sometimes such as have been done to some particular members of it. What is taken from the enemy to make reparation for damages done to the state in its corporate capacity, plainly belongs to the state itself, and not to the particular captors, who are members of the state. The only doubt is about what is taken, upon account of damages, that have been done to private persons. And here it is plain, that unless the captors themselves are the persons, to whom these damages have been done, the purpose, for which the goods are taken, gives the private captors no claim to them. But if the captors themselves are the persons, who have been injured, it will be necessary to consider, whether they make reprisals by their own authority without any commission either general or particular from the state, or whether they act under the general commission of solemn war, or under some particular commission of reprisal. Where they take the goods of another nation without having any commission from their own, this case is out of the present question : there is, by the supposition, no public war, or no war between the two nations ; because, if there was, the captors would act at least by the general commission of war, though they had no particular commission of reprisal. If they thus make reprisals at their own discretion, the act is their own, and they are answerable for the justice of it. For though by the social compact they had a claim to be supported by the public in obtaining reparation of such damages, as they have sustained from foreigners, yet if they will undertake of their own accord to obtain it for themselves, it is their business to see, that what they do is

no more than natural justice will warrant, and to support their own act, after they have done it. Since therefore they themselves are answerable for what they do, in thus taking the goods of foreigners, the goods, which are so taken, are acquired for themselves; and the public, as it is not concerned in the act of taking them, can have no claim to them. Where the damages, which the captors have sustained, is the cause of a solemn war, the state by thus undertaking to recover reparation of their damages makes itself answerable to them for what they have lost, as far as it recovers reparation. In the mean time if they act only by the general commission of solemn war, and have no particular commission to make reprizals for themselves, they act no otherwise than as parts of the state: and notwithstanding the claim, which they have upon the public, what they take belongs in the first instance to the public and not to them. But if they act under a particular commission from the state to make reprizals for themselves, whether the war is solemn or imperfectly public, they acquire property for themselves in the goods which they take; not because they are the persons, to whom reparation is to be made; for the same commission, if it had been given to any of the other subjects, would have produced the same effect; nor yet because they are the captors; for the goods, if they had taken them in a solemn war, without such a commission, would in the first instance have accrued to the public; but because the nation has conveyed to them its interest in what they take by the particular commission, under which they act; by this commission the nation makes them its agents, but the nature of the commission is such as makes them the nation's agents for their own interest.

The army or the fleet of a nation is immediately employed by the public, and consequently what either



of them takes will naturally accrue to the nation. If it is otherwise in any nation, if the foldiers have in any nation a right to the plunder, or the feamen to the captures, which they make; this right is derived, as we have already hinted, from an occasional grant, which the nation makes to them, or from a ftanding grant made either by the written civil law of the nation, or by custom, which is an unwritten civil law. But when a nation has exprefsly granted to its army or to its fleet property in what they take, whether the grant is made occasionally, or made by a written civil law, if the army or the fleet fhould take a town, or if the army fhould over-run and feize a province; they would have no claim by this grant to the jurifdiction or paramount property of fuch town or fuch province. For the word—property—is to be conftrued in fuch a fenfe as is fuitable to the condition of the perfons, to whom it is granted. Subjects have ufually no other fort of property befides what confifts in private ownership. The notion therefore of property, when it is applied to them, does not include jurifdiction or paramount property. And confequently whatever other property the army or the fleet might claim by means of fuch a grant in the towns or the provinces, which they have taken; the jurifdiction or paramount property would, notwithstanding the grant, accrue to the nation. For a like reason, if fuch moveable goods, as the army or the fleet takes in war, have by custom been acquired for themfelves and not for the nation; fuch a custom will give them no claim to towns or provinces, which they take: becaufe a customary claim to an inferiour kind of property does not imply a claim to jurifdiction.

It is to be obferved, that though in treaties of peace the property of fuch moveable goods, as have been

taken from an enemy during the war, commonly passes by tacit consent from the enemy to the nation, which takes them; yet this is not necessary. A nation in an unjust war has no claim to damages or to expences, and, even in a just war, it may have taken more than its damages or expences amount to. Whilst the war continues, the nation has of right nothing but the custody of the goods, which it has taken. If therefore it has granted the property of such goods to the private captors, and the enemy, when he comes to make peace, should insist upon restitution of what has been taken more than is due; it might be a question, whether the nation or the private captors are to make the restitution? In respect of the enemy the obligation to make restitution rests upon the nation: because in respect of him the nation is the captor, and what has passed between the nation and its own members does not fall under his notice. But if the grant, made by the nation to the private captors, contained a reserve, that in case the enemy demands restitution of what they have gotten, they shall return it into the custody of the public; they are then obliged to return it, or an equivalent for it: because they have no fuller right to it, than they derive from the grant of the nation, and consequently hold it under all such reserves, as are contained in this grant. If there is no reserve of this sort, the nation, though it is obliged to make restitution, has no other demand upon the private captors, than it has upon all its other members, to contribute towards this restitution. An absolute grant of property made by the nation will bar all other demands. For though it has granted absolute property, where it had itself only a precarious property, this is its own fault, and will not affect the claim of the proprietors. It would affect their claim, if they were responsible to the enemy: be-

cause in respect of the enemy, the nation could not give them absolute property, where its own property was precarious. But as the nation is responsible to the enemy, and they are responsible only to the nation, the grant which the nation has made, will hold good against itself; though such grant was made in its own wrong.

What prevents prisoners of war from being slaves.

XVII. Since all the members of a nation, against which a just war is made, are bound to repair the damages, that gave occasion to the war, or that are done in it, and likewise to make satisfaction for the expences of carrying it on; the law of nature will allow those, who are prisoners to be made slaves by the nation, which takes them; that so their labour, or the price for which they are sold, may discharge these demands. Thus the acquisition of prisoners of war, or rather of their personal labour, is made in the same manner and is subject to the same rules with the acquisition of the goods of the enemy. Despotism however, when it is thus acquired, cannot include a right in the masters or owner of such prisoners of war, as are made slaves, to dispose of their lives at pleasure. The captors have a right to every valuable consideration, that the prisoners can make over to them, towards repairing the public damages or returning the public expences: but the death of the slave, whilst it is a loss to him, brings no profit to the nation, that took him prisoner. And if the nation had no right to take away his life, no private owner, who claims under the nation, can have such a right. <sup>p</sup> Grotius here follows the common opinion, that as the law of nations permits prisoners of war to be killed, so the same law has introduced a right of making them slaves, that the captors, in view to the benefit arising from the labour or the sale of their prisoners might be engaged to spare their lives: In



this account of the means by which prisoners of war become slaves, their slavery begins from the right which the captors have over their lives. The reader therefore may perhaps imagine, that the same right continues in their masters, after they become slaves. But we have already shewn, that the principle, upon which Grotius here sets out is not universally true. A nation has not, even in a just war, a general right to kill the prisoners, that it takes. The only general right that it has over them, is the same that it has over all the members of the adverse society: those members who are taken prisoners, are bound, as all the other members are, to repair the damages, which it has sustained, and to return the expences, which it has made. Where it is inconsistent with the security of the captors to save the prisoners, they may lawfully kill them. But it is impossible in the nature of the thing, that any question should arise, whether if any prisoners have been reserved for slavery in such an exigency, the right, which the captors had over their lives, whilst they were prisoners, does not continue after they are made slaves? the case implies, that the prisoners cannot be saved: for if they could be saved, the captors would have no right to kill them. We must either suppose on the one hand, that the lives of the prisoners can be saved, consistently with the safety of the captors; and then the captors will have no right over their lives from the first, and consequently can have no such right, after they are reduced to a state of slavery; or else we must suppose that the prisoners cannot be saved, consistently with the safety of the captors; and then though the captors have a right to take away their lives, this right cannot continue, after such prisoners are become slaves; because they must all be destroyed, and consequently none will be left to

make slaves of. The case will be the same, if we suppose, that an army has taken so great a number of prisoners, that it cannot save them all consistently with its own safety, and that it therefore kills some and saves as many as it can. We cannot ask, whether the nation, to which the army belongs, has a right over the lives of those, who are killed, when they become slaves? because as they are killed, they never can become slaves: and as to the rest, whose lives could be preserved, consistently with the safety of the army, neither the nation nor its army had from the first any right over their lives, and can therefore have no such right after they come into a state of slavery. If there are any particular prisoners, who have committed such a personal crime against the nation, which takes them, as deserves death, though the general offence of the society, to which they belong, would give it no right to take away their lives, yet a crime of this sort may give it such a right. But if the nation instead of killing these prisoners, makes slaves of them; whatever right over their lives it had before, by the act of making them slaves it parts with this right: for by this act it consents to take their labour in exchange for their lives.

This is the general law concerning prisoners of war. In Europe indeed prisoners of war are not slaves. But their slavery is prevented by the law of each particular nation, and not by any law, which all the nations of Europe have agreed to establish amongst themselves, as the common rule of their conduct towards one another. The civil law of each particular nation does not allow of slavery, unless perhaps where a subject of its own has committed a crime, for which this law condemns him to labour in the mines, or in the galleys, or in the foreign plantations. And if the civil law of any

nation does not allow of slavery; prisoners of war, who are taken by that nation, cannot be made slaves. There are however even in Europe some remains of the right, which slavery produces over the persons of prisoners of war. They are exempted from the labours and drudgery of slaves; but the nation, which takes them, considers itself as having some right to their persons, and accordingly sells their liberty at the price of a ransom, or else barter them away in exchange for its own subjects, who have been taken prisoners in war by their nation. This right would continue even after peace is concluded between the two nations; if in the treaty of peace there was no express stipulation for a release of prisoners. But as no profit is to be had from their labour, and it would be expensive to keep them; there is always a prudential reason for releasing such of them at least as cannot pay their ransom; though no compact has been made about them.

XVIII. After what has been said about public war, the effects of a declaration of war may be easily understood. One effect of it is merely nominal. Though every contention by force is war, and every contention of two nations by force, upon the authority of their respective supreme governours in external matters, is public war; yet in the more common language, when we are speaking of the contentions of two nations, we call them reprizals or acts of hostility, and do not give them the name of war, unless war has been declared. After war is declared; as we then call the contention of two nations emphatically war, so it is sometimes called solemn and sometimes just war. But this title of just war is merely nominal; it imports,\* that a war, when it is declared, is perfectly public, and not that it has any peculiar sort of external justice, or that it produces any effects of right, by a purely positive law

Effect of  
a declaration  
of  
war.



of nations, which other public wars will not produce, and much less that it is of course internally just.

The only real effect of a declaration of war is, that it makes the war a general one, or a war of one whole nation against another whole nation: whilst the imperfect sorts of war, such as reprisals, or acts of hostility, are partial, or are confined to particular persons, or things, or places. In a solemn war all the members of one nation act against the other under a general commission; whereas in public wars, which are not solemn, those members of one nation, who act against the other, act under particular commissions. I do not mean, that, when one nation has declared war against another, all the members of the former must necessarily be at liberty to act as they please against the latter. The nation, which has so declared war, has still authority over its own subjects, and may restrain them from acting against the other nation in any other manner, than the public shall direct. So that, in consequence of such a restraint, none can act in the war, even though it has been declared, besides those, who have particular orders or commissions for this purpose. But this restraint, and the legal necessity, which follows from it, that they, who act, should have particular orders or commissions for what they do, arises not from the law of nations, or from the nature of the war, but from the civil authority of their own country. A declaration of war is in its own nature a general commission to all the members of the nation, which has declared war, to act hostility against all the members of the adverse nation. And all restraints, that are laid upon this general commission, and make any particular orders or commissions necessary, come from positive and civil institution.

<sup>a</sup> Grotius distinguishes here between what is commanded by the law of nature, what is matter of civil institu-

tion, and what is required by the law of nations. The law of nature, he says, when it is applied to individuals in a state of nature, will allow us to make use of force against them, to punish them for any crimes, which they have committed, or to recover our own goods, which they have unjustly taken from us, or to defend ourselves against any injury, which they are attempting to do us, though we give them no notice beforehand, that we will make use of such force. But before we can justly seize upon any of their goods as an equivalent for what they have taken from us, the law of nature requires, that we should make a demand of our own goods. For our primary right is a right to our own goods: the right to an equivalent is only a secondary one, and does not take place, till the other is finally defeated. There is a farther reason against seizing upon the goods of a nation or of some of the members of it, upon account of any damages; which we have sustained from others of its members, till we have demanded of the nation to do us justice against its subjects. For without a refusal to comply with such a demand, the law of nature will not make the nation a party in the offence of its members, and consequently will not justify us in making war upon it. But Grotius seems here to confound two things, which are widely different from one another. I allow, that the law of nature requires such a demand as this to be made, before it will justify a public war: but this is no evidence, that it likewise requires a declaration of war: because a declaration of war is not the same thing with a demand to have justice done us, which demand is made in order to avoid a war. These two acts may be done at one and at the same time: as when we declare war conditionally, unless our demands are satisfied: but still they are different acts: the declaration

of war is void, that is, the war does not take place notwithstanding the declaration, if the demand produces its proper effect by obtaining reparation for the damages, that we have sustained. Grotius allows here that the law of nature does not require a declaration of war to be made in order to prevent all appearance of deceit or of clandestine management, and to give the adverse nation an opportunity of being upon its guard. This is not matter of strict right, however it may be matter of bravery or of what goes under the notion of honour: as some nations have, upon the same principle, given notice to the enemy beforehand of the day and the place of battle.

The formalities of declaring war belong to the civil law: each nation determine for itself by what officer in what places and with what ceremonies, a declaration of war shall be made.

Grotius derives the principal obligation to declare war from a purely positive law of nations. This obligation, as he explains it, is derived from an external purpose and not from any internal reason of natural justice. A war, he says, unless it is declared, does not give impunity to the parties concerned in it, and does not give one of the parties property in what it takes from the other. But if by the parties concerned in the war we mean the nations; neither the reason of the thing nor the common practice of nations will give them any other impunity, or allow them any otherwise to obtain property in what is taken, where war has been declared, than in the less solemn kinds of public war, which are made without a previous declaration. Indeed in solemn war the individual members of a nation, which has declared war, are not punishable by the adverse nation for what they do: because the guilt of their actions is chargeable upon the nation, which



directs and authorizes them to act. But even this effect may be produced, though not in respect of all the members of the nation, yet in respect of some of them without a declaration of war. For in the less solemn kinds of war, what the members do, who act under the particular direction and authority of their nation, is by the law of nations no personal crime in them: they cannot therefore be punished consistently with this law for any act, in which it considers them only as the instruments, and the nation as the agent.

XIX. When two or more nations are at war with one another, the principal question relating to neutral states, that is, to such states as are not parties in the war, are; <sup>r</sup> first, what these neutral states may do in respect of either of the nations, which are at war, without departing from their neutrality; and secondly, what conduct is allowable in the nations, which are at war, towards the neutral states.

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The general rule in the first of these questions is, that a neutral state is not at liberty to give any assistance to either of the states, that are at war. This rule, when it is thus generally expressed, is not so to be understood, as if it was naturally unjust for a state, which is for some time neutral in a war, to join itself in the progress of the war to one of the contending parties. When we say in general, that a neutral state is not at liberty to assist either party; we only mean, that it cannot assist either consistently with its neutrality. But if we distinguish the notion of neutrality into general and particular; the rule in a particular neutrality will bear, or rather will require, a different construction. The neutrality of a nation is general, where it is not in fact a party in a war. The neutrality is particular, where the nation has bound itself by compact to one or both the contending nations not to make itself a

party. If the neutrality is only general; it is only inconsistent with such neutrality to give assistance to either of the contending nations; that is, the state, by giving its assistance to either of them, ceases to be a neutral state, and may be treated by the other of them as a party in the war. If the neutrality is particular, and a compact of neutrality has been made with both; it will then be a breach of compact and consequently an injury against one of them, to give assistance to the other. Or if the compact is made with only one of them, the giving of such assistance to the other will be a breach of this compact: but to assist the nation, with which this compact is made, will only be a simple breach of neutrality in respect of the other.

The reason of this rule arises out of the nature of things, and shews it to be a rule of the law of nature, which may be applied alike either to individual persons in a state of equality or to the collective persons of civil societies. For the notion of neutrality in a war, whether the war is private or public, consists in avoiding to take part with either of the persons, who are engaged in it. But to give assistance to one of them is to take part with that person, to whom such assistance is given, and consequently is inconsistent with the notion of neutrality.

The neutrality of a state abridges its liberty of trading with either of the contending nations, but does not wholly destroy this liberty. \* Nothing is inconsistent with the notion of its neutrality, besides assisting one of them in the war. It may therefore supply either of them with all goods, as if they were at peace with one another, except such goods, as will help the party, that is supplied with them, to carry on the war more effectually. Goods of this sort are called *contraband*. This word is sometimes used in another sense,

\* Grot. L. III. C. I. § V

and means all such goods, as a nation will not allow to be exported out of its territories or to be imported into them. But this is not the sense, in which it is commonly used in the question, that is now before us. The notion of contraband goods is of some latitude: so that it is not easy precisely to determine, what are, and what are not, of this sort. All warlike stores are undoubtedly contraband. But still the question returns, what are to be reckoned warlike stores? Grotius has removed some of the uncertainty in this question by dividing goods into three sorts. Some goods have no use, except in war, such as arms and ammunition. Some are of no use at all in war, and serve merely for pleasure. And some are of use either for the purposes of war, or for other purposes; such as money, provisions, ships, and the materials for the building, fitting out, or repairing of ships. The first sort is plainly contraband; and the second sort is plainly not so. In the third sort, in order to determine, whether they are contraband or not, we must consider the condition, and circumstances of the war. Where a war is carried on by sea as well as by land, not only ships of war, which are already built, but the materials for building or repairing of ships, will come under the notion of warlike stores. It may be said indeed, that timber or cordage may be used for other purposes, besides the building or fitting out of ships, or that it may be used for the building and fitting out of other ships, which are not ships of war. But this will be of no great weight: for the same might be said of horses or saddles, or many other things, which are commonly reckoned amongst warlike stores: they are capable of being employed for other purposes; the uses of them are not necessarily confined to the purposes of war. But as arms or ammunition are warlike



stores in their own nature, so timber, or cordage, as well as horses, or saddles, may in all reason be reckoned warlike stores; when from comparing the sorts or the quantities of them with the condition and circumstances of the war, it appears, if not to be impossible, yet at least to be in the highest degree unlikely, that they should be designed for any other purposes besides the purposes of war. Even common provisions for the support of life will come under the notion of warlike stores, when they are going to a place, which is besieged or blockaded. They are not indeed such weapons, as will annoy an enemy in war; but they are such stores, as will help the nation, to which they are carried, to make its defence in war more effectually, than it could have done without them, when one of its towns is besieged or blockaded.

Sometimes to remove all possibility of doubt about what goods are contraband, a nation, that is at war, enumerates them, particularly in treaties or compacts with neutral states: and such treaties leave the neutral states, with which they are made, at liberty to supply the enemy with all goods, that are not enumerated in them. But these treaties do not operate as a law and determine what shall and what shall not be reckoned contraband amongst all nations whatsoever: they are in this respect like all other treaties, and are binding only between the nations, that are parties to them.

<sup>t</sup> Grotius himself confesses, that he was forced to examine this question by the law of nature; because he could find no evidence of a purely positive law of nations. But the law of nature, when it is thus applied to the collective body of nations, though our author does not call it the law of nations, is what we have hitherto called by this name, and is the only law of nations, that has any real foundation.

<sup>t</sup> Ibid.

When contraband goods are carried to our enemy by a neutral state, which either did know, or might have known, that the assistance, which it thus gives to our enemy, will hinder the execution of our right; as this neutral state does us damage, it is obliged, in the opinion of <sup>u</sup> Grotius, to make us amends; and if such amends is refused, we may justly make reprisals upon it to the amount of the damage. But here he supposes the contraband goods to have been delivered, and some actual damage to have been done. For if the neutral state has not done any actual damage, but only designed to do it, he does not allow us a right of reprisal, or even a right to take contraband goods to our own use, unless we take them upon the claim of necessity; that is, unless the exigency of affairs is such, that we cannot possibly do without them. All that he allows us to do, when we are not pressed by such a necessity as this, is to compel the neutral state to give us security by hostages, or pledges, or some other means, that it will not attempt any thing of the like sort for the future. If indeed the neutral state not only does a simple injury, but appears plainly to have had a malicious design of hurting us by confirming and assisting our enemy in an unjust war against us; this, says Grotius, is a criminal act; and as we may punish it for such an act in some other way; so likewise we may punish it by deprivation of goods, and particularly by seizing the contraband goods, which it was carrying to the enemy. But there is a reason, which our author does not take notice of, why we may, consistently with the law of nature, seize upon the contraband goods of a neutral state, which it is carrying to the enemy, as if they were the goods of an enemy, without considering this act as a crime, for which we may punish those, who are guilty of it, by depriving them of their goods. If we

<sup>u</sup> Ibid.

meet with the contraband goods in their passage, and prevent the delivery of them to the enemy ; there is certainly no actual damage done to us by the neutral state, from which they came : there is only a design of doing us damage. And this design, if it is considered separately from its circumstances, will give us only a right of guarding against it, or perhaps of taking some security against any future attempt of the same sort. But the first instance of such an attempt is a breach of neutrality : a neutral state by sending contraband goods to our enemy, whether it delivers them or not, makes itself so far at least an accessory to the war, as it would have given assistance to our enemy, if we had not prevented it. We cannot indeed treat it as a principal in the war, where it does not assist the enemy with its whole force. But as far as it is an accessory to the war we may treat it as an enemy, and consequently may seize the contraband goods, as if they had belonged to an enemy. The injury, which the neutral state attempts, as it is not completed, produces no claim to reparation of damages : but the attempt itself makes the neutral state an accessory to the injuries, which we have received from the enemy : and thus the neutral state, by communicating in the injustice of the enemy, gives us a right to demand reparation for damages, as far as it has communicated in this injustice.

Under the second question relating to neutral states, Grotius takes no particular notice of any thing, which may be done against them by a nation, that is at war, except what it is compelled to do by absolute and unavoidable necessity. If it has any right at all to seize upon any neutral towns, and to put garrisons into them to prevent them from falling into the enemy's hands, this right can arise from nothing but the extreme danger, which it would be in, if the enemy should get



possession of them, and the plain evidence, that the enemy has a design to seize them, and would otherwise succeed in such a design. And even this right of necessity is subject to many restrictions. When we seize a town upon this pretence, we can only take the custody of it, and have no right to any jurisdiction over it: because whatever the custody of the town may be, the jurisdiction over it cannot be necessary for our security. Whatever damages the nation, to which the town belongs, may suffer either upon account of our having the custody of it, or by our means, whilst it is in our hands, we are obliged to make reparation for them. And as soon as the necessity, with which we were pressed, is over, we are obliged to withdraw our garrison, and to give up the place into the hands of the nation, to which it belongs. But these are not the only restrictions of this right: there is another, which renders it so precarious in the exercise, as to be little better than no right at all. We cannot be justified even by necessity in seizing it, if the neutral state, to which it belongs, is pressed by an equal necessity. And since this state may reasonably apprehend itself to be in danger of being treated by the enemy as an accessory to our act of seizing the town, it has an equitable claim to judge of its own necessity: and consequently our claim of necessity can scarce take place consistently with justice, unless we have first obtained the consent of the state.

We have a right in war to take the goods of the enemy. But this right is restrained to such goods as are either in our own territory, or in the territory of the enemy, or in places, which are not parts of the territory of any state. For if the goods of an enemy are in the territory of a neutral state; since we have no right to go thither in a hostile manner; they are under the protection of the state, and the law of nations will

not allow us to take them. <sup>w</sup>In like manner we have no right to take them, if they are on board a ship, whilst the ship is in a neutral port; whether the ship itself is a neutral one, or belongs to the enemy; because the port is a part of the territory of the neutral state. When the goods of an enemy are on board the ship of an enemy, and the ship is in the main ocean, there can be no doubt about our right of taking both the goods and the ship: because they are then in a place, which is not in the territory of any nation. But when the goods of an enemy are on board a neutral ship, and the ship is in the main ocean; though we have a right to take the goods, we have no right to take the ship, or to detain it any longer, than is necessary to obtain possession of the goods. For the ocean itself is no territory: and neutral ships, as they are moveable goods, are not parts of the neutral territory. As long as the ships continue in their own ports, the goods, which are on board them, as well as the ships themselves, are within the neutral territory, and cannot be taken. But as soon as the ships come into the main ocean, the goods, which are on board them, are in no territory, and consequently are no more under the protection of the neutral state, than the same goods would be, if they were passing through an uninhabited country, where no nation has jurisdiction, in neutral carriages or on neutral horses. A neutral ship may indeed be called a neutral place: but when we call it so, the word—place—does not mean territory; it only means the thing, in which the goods are contained: and as this is a moveable thing, it is no part of the territory, and is no longer under the jurisdiction of the nation, than it continues within the territory. Though the goods of the enemy had been on board a ship belonging to the enemy, we might have said in the same sense, that they were in a

<sup>w</sup> Grot. L. III. C. I. § V. Not.

neutral place, if they had been locked up there in a neutral chest. But no one would imagine, that such a neutral place, as a chest, can be considered as a part of the territory of the neutral state, or that it could protect the goods; notwithstanding a neutral chest is as much a neutral place, as a neutral ship. The jurisdiction of a nation over things is confined to that tract of land, upon which it is settled, and to such waters as are appendages to that land. These immoveable things, which are called the territory of a nation, are the immediate objects of jurisdiction or paramount property. Moveable things are the proper objects of inferior property, or private ownership, and are no otherwise the objects of jurisdiction, than as they happen to be within the territory. Thus a ship, though it is a moveable thing, is under the jurisdiction of a nation, whilst it continues in one of its ports. But as soon as it is out at sea, only the private ownership or inferior property of the ship continues: it ceases to be under the nation's jurisdiction. The case will be the same, if instead of supposing the ship to be the property of a private merchant, we suppose it to be the property of the nation. For though we cannot well call the property, which the nation has in such a ship, by the name of private ownership; yet when the ship comes into the main ocean, the jurisdiction or paramount property of the nation ceases; and the right, that remains, is an inferior kind of property, which has the nature of private ownership. But if the jurisdiction, which a neutral state has over the ships of its members, or even over its own ships, ceases, when the ships are out at sea; the goods of an enemy, that are on board such ships, cannot be under the protection of the nation in the same manner, as if the ships had been in one of its ports, or as if the goods had been on its land.



Notwithstanding a ship, when it is in the main ocean, is no part of the territory of a nation, and consequently is not subject to the jurisdiction, which the nation has over things; yet the men, who are in it, as they are members of the nation, are still subject to the jurisdiction, which it has immediately over the persons of its members. It is proper to take notice of this jurisdiction, though it is not material to the present question: because otherwise, when I say, that the jurisdiction of a nation over its own ships, or the ships of its members ceases, as soon as they are in the main ocean, the reader might have imagined, that I suppose the whole jurisdiction of the nation to cease, its jurisdiction as well over the persons, who are in the ships, as over the ships themselves. When the seamen are on land, or in port, the nation has an immediate jurisdiction over them, as they are members of it, and a mediate jurisdiction over them, as they are persons within its territory. But when they are out at sea, though in one of its own ships, only the former sort of jurisdiction remains, and the latter sort ceases.

In some nations, causes which arise at sea and have no connection with the land, whether they are civil or criminal, are cognizable by particular courts of marine or admiralty, which do not make use of the same forms, that are used in other courts of the same nation, and do not proceed upon what is called the law of the land, or of the territory. It is plain, that, in the opinion of any nation, where such courts are established, a ship, when it is out at sea, is no part of its territory: for if it was though there might be a distinction of courts, there could be no reason, why the courts, which have cognizance of such causes as arise at sea, should decide according to any other law than what is the general law of the land in all causes, which are in every respect the

same, except only, that they arise on the land or are connected with it.

Though a neutral nation, when its ship is in the main ocean, has no such jurisdiction over the ship itself, as if it was a part of its territory, yet either the nation itself, or some of the members of the nation, which is the same thing in the view of the law of nations, will continue to have an inferior sort of property or ownership in it. And this inferior property or ownership will render it unjust in us to take the ship, notwithstanding we may lawfully take any goods of the enemy, which are on board.

But here a difficulty offers itself, which must not be overlooked. That inferior kind of property, which we have called private ownership to distinguish it from a jurisdiction over things, is an exclusive right : those persons, who have such ownership in things, whether they are private or public persons, have a right to exclude all other persons from making use of these things. \* By this means the rights of others are frequently hindered from taking effect. Wild beasts, and birds, and fishes, are, till they are caught, in common to all mankind ; and I have a right with the rest of mankind to catch them, and to make them my own by catching them. But I cannot hunt or shoot or fish without using the soil or the water of another man. And as I have no right to use these without his consent ; he may justly hinder me from doing any of these acts, as far as his right of property extends. Thus therefore by his private ownership I am hindered from taking such things, as I should otherwise have a right to take, if they did not happen to be in such places, as he has an exclusive right to. In like manner, though we have a general right to take the goods of an enemy, when they are out at sea, yet there is some reason to

doubt, whether the effect of this right may not be hindered by the inferiour property or ownership, which a neutral nation has in the ship, where the goods are. For it may be said, that notwithstanding our general right to take the goods, the neutral nation considered merely as a private owner has an exclusive right to its own ship, and consequently may hinder us from coming into the ship to take the goods. Those, who set up a purely positive law of nations, have nothing else to do here in answer to this difficulty, but to prove the existence of such a law, and to shew that this law has in fact determined otherwise. But if the law of nations is nothing else but the law of nature applied to the collective persons of civil societies; instead of answering, that the law of nations has determined otherwise, we must find out a natural reason, why it should determine otherwise. Where I have merely a right to acquire property in a thing, which is in common to all mankind, but cannot acquire property in it without the use of what is already the property of some other man; this man neither does me an injury, nor encourages or protects others, who have injured me, by excluding me from the use of what belongs to him. And thus my right of acquiring things, which are in common, will by his means fail of producing its effect: whilst he, by whose means it so fails, will be chargeable with no crime, or no fault; because he has done nothing more, than his property in what I wanted to use, will justify him in doing. But where we have a right in war upon account of the damage, which the enemy has done us, to take the goods of the enemy, and these goods are in a neutral ship; if the neutral state, though it has property in the ship, should make use of its right of property to protect the goods against us; this protection makes it an accessory to the injury, which



gave us a claim upon the enemy to obtain reparation of damages, and consequently is inconsistent with the notion of neutrality. But whilst this answer removes one difficulty, it brings on another. If a neutral nation makes itself an accessory to the damages, that the enemy has done, by protecting such goods of the enemy, as we have a right to take for reparation, when these goods are out at sea in one of its ships; why might the same nation, without making itself an accessory to those damages, protect the same goods, when the ship is in one of its ports, or when the goods are on land within its territory? A law of nations, which is natural as to the matter of it, and positive only as to the objects of it, will furnish us with an answer to this question. Every state has by the law of nations an exclusive jurisdiction over its own territory. As long therefore as a state keeps within its own territory, and exercises its jurisdiction there, we have by this law no right to take notice of what it does; unless indeed where by protecting some person, who has committed a crime in our territory, it infringes upon our jurisdiction. But when its ships are in the main ocean; as they are then in a place out of its territory, where by the law of nations it has no jurisdiction; this law will allow us to take notice of the protection, which it gives to the goods of the enemy, and to consider it as an accessory to the damages done by the enemy, if it gives them protection.

The goods belonging to a neutral state or to any of its members cannot lawfully be taken, when they are on board the ship of an enemy. The neutral state has indeed no jurisdiction in the ocean, where the ship is; but it has property in the goods: and as the law of nature will not allow us, so there is no purely positive law of nations that will warrant us, to violate this right of property. In the mean time the neutral goods

will not secure the ship itself. For the ship is neither the property of the neutral state nor within its jurisdiction.

Since the members of a nation, which is engaged in a war, whether they act under particular commissions, or under the general commission of public war, may take the goods of the enemy, but cannot lawfully take any goods or ships, which are the property of a neutral state, unless the goods are contraband; who shall be the judge in these two questions, that is, who shall determine, whether the goods or ships, which the members of such a nation have seized upon and gotten into their possession, are the property of the neutral state; and if they are its property, who shall determine, whether they are contraband? Other neutral states, which have no interest in the goods or ships, might be unprejudiced judges: but the law of nations has not made them authentic judges. All nations are in respect of one another in a state of nature or of equality: no one nation has jurisdiction over the rest, and no number of nations has jurisdiction over any one. The same reason which excludes all other nations from having jurisdiction in these questions, will exclude both the neutral nation whose members claim property in the goods or the ships, and likewise the nation, whose members have them in their possession, and claim them by the right of war. These two nations are in respect of one another in a state of equality; and neither of them has any authority over the other. The jurisdiction, which the neutral nation has over things will not extend to the things in question: because they are not within its own territory. And its jurisdiction over the persons of its own members will here give it no judicial authority: because in these questions its own members are the parties only on one side: the members of the other nation

are the parties on the other side ; and the neutral state has no jurisdiction over their persons. In respect of these reasons which exclude the jurisdiction of the neutral state, there is no material difference between that and the other, to which the captors belong. The things in question will indeed be within the territory of the latter if the captors have brought the ships into their own ports. But the controversy arose upon the main ocean which is out of its territory : and as it had no jurisdiction in the first instance, the subsequent act of bringing the things into its territory will not give it jurisdiction. If any subsequent act can give it jurisdiction, it must be a subsequent consent of the parties, The foreigners, who claim the goods or ships, may agree with the captors to have their respective claims decided by the state, to which the latter belong. And such an agreement will bind them to submit to the sentence of this state. But if the things were brought by force into the ports of the state, to which the captors belong ; this act of force can produce no effects of right ; till it appears whether the force is lawful or not ; that is, till it appears, whether the goods might lawfully be taken or not : and consequently this act can produce no jurisdiction in the state to determine, whether they might lawfully be taken. Till the force is determined to be lawful, it gives the state no jurisdiction ; where it had none before. But the force cannot be determined to be lawful, till there is a definitive sentence, that the things, which are in the possession of the captors, might lawfully be taken. The state therefore cannot have jurisdiction by means of this force, till the question, in which the jurisdiction, that we are enquiring after, is wanted, has been determined.

In the usual practice of nations, the state, to which the captors belong, decides whether ships or goods,



which are seized upon in war, are the property of a neutral state or of an enemy, and whether the goods, if they are the property of a neutral state, are contraband or not. But since the law of nature does not give it any authority in these questions, which can properly be called jurisdiction; it will be necessary, if there is no purely positive law of nations, that has given it such jurisdiction, to enquire upon what natural reasons its right to decide about them is founded, and what sort of a right this is. The state, to which the captors belong, has a right to inspect into their behaviour; both because they are members of it, and because it is answerable to all other states for what they do in war; since what they do in war, is done either under its general or under its special commission. The captors therefore are obliged upon account of the jurisdiction, which the state has over their persons, to bring such ships or goods, as they seize in the main ocean, into their own ports: and they cannot acquire property in them, till the state has determined, whether they were lawfully taken or not. This right, which their own state has to determine this matter, is so far an exclusive one, that no other state can claim to judge of their behaviour, till it has been thoroughly examined into by their own: both because no other state has jurisdiction over their persons; and likewise because no other state is answerable for what they do. But the state, to which the captors belong, whilst it is thus examining into the behaviour of its own members, and deciding whether the ships or goods, which they have seized upon are lawfully taken or not, is determining a controversy between its own members and the foreigners, who claim the ships, or the goods: and this controversy did not arise within its own territory, but in the main ocean. The right therefore, which it exercises, is not

civil jurisdiction; and the civil law, which is peculiar to its own territory, is not the law, by which it ought to proceed. Neither the place where the controversy arose, nor the parties, who are concerned in it, are subject to this law. The only law, by which this controversy can be determined, is the law of nature applied to the collective bodies of civil societies, that is, the law of nations. Unless indeed there have been any particular treaties made between the two states, to which the captors and the other claimants belong. They may have mutually bound themselves by particular treaties to depart from such rights, as the law of nations would otherwise have supported: goods, which would naturally have been contraband, may by express treaty be made free; and on the other hand goods, which would naturally have been free, may be made contraband: neutral goods, which are on board the ship of an enemy, may by express treaty be made lawful prize, though by the law of nature they would have been free; and the goods of an enemy on board a neutral ship may be made free, though by the law of nature they would have been lawful prize. Where such treaties have been made, they are a law to the two states, as far as they extend, and to all the members of them, in their intercourse with one another. The state therefore, to which the captors belong, in determining what might or what might not be lawfully taken, is to judge by these particular treaties and by the law of nations taken together.

This right of the state, to which the captors belong, to judge exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence; though this sentence should happen to be erroneous: because it has a complete jurisdiction over their persons. But the other parties in

the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations or to particular treaties: because it has no jurisdiction over them, in respect either of their persons, or of the things, that are the subject of the controversy. If justice therefore is not done them, they may apply to their own state for a remedy, which may, consistently with the law of nations, give them a remedy either by solemn war or by reprisals. In order to determine when their right to apply to their own state begins, we must enquire, when the exclusive right of the other state to judge in this controversy ends. As this exclusive right is nothing else but the right of the state, to which the captors belong, to examine into the conduct of its own members, before it becomes answerable for what they have done; such exclusive right cannot end, till their conduct has been thoroughly examined: natural equity will not allow, that the state should be answerable for their acts till those acts are examined by all the ways, which the state has appointed for this purpose. Since therefore it is usual in maritime countries to establish not only inferior courts of marine to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral state can have no right to apply to their own state for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state, to which the captors belong, to examine into their conduct: and till their conduct has been examined by all these means, the state's



exclusive right of judging continues. After the sentence of the inferiour courts has been thus confirmed, the foreign claimants may apply to their own state for a remedy, if they think themselves aggrieved: but the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. And even if upon their own report they appear in the judgment of their own state to have been actually aggrieved: yet this will not justify it in declaring war or in making reprisals immediately. When the matter is carried thus far, the two states become the parties in the controversy. And since the law of nature, whether it is applied to individuals or to civil societies, abhors the use of force, till force becomes necessary; the supreme governours of the neutral state, before they proceed to solemn war or to reprisals, ought to apply to the supreme governours of the other state, both to satisfy themselves, that they have been rightly informed, and likewise to try, whether the controversy cannot be adjusted by more gentle methods.

XX. Though Grotius refers the privileges of ambassadours to a purely positive law of nations; yet after any person, who is sent from a foreign nation in the character of an ambassadour, is received in that character by the nation, to which he is sent; the several privileges, that Grotius mentions, will arise out of the law of nature applied to the collective persons of civil societies.

Privileges  
of ambaf-  
sadors  
how far  
natural.

The law of nature does not give any one nation a strict right to demand, that any other nations shall receive ambassadours from it. This is no otherwise enjoined, than as a matter of mutual convenience, or at the most of friendship or kindness. An intercourse of good offices is due to mankind in general, and particularly to all, who have not deserved to be treated as

enemies. And this intercourse is kept up and carried on amongst nations by means of ambassadours, that is, of persons, who are sent from one nation to another to transact business between them. Sometimes they are thus sent to procure peace, where the two nations are at war, or to maintain peace, by adjusting such controversies as are arising between them, and might otherwise be occasions of war. Sometimes their business is to form an alliance between the nations for their mutual defence, or to establish other treaties, which tend to advance their mutual interest. It would be unkind and unfriendly, as well as imprudent, to refuse them admittance, when they come for such purposes as these. But since the right arising out of those affirmative precepts of the law of nature, which relate to benevolence, are of the imperfect sort; if a nation should refuse to receive ambassadors, who are sent to it, this cannot properly be called an injury to the nation, which sends them. There may be such reasons against receiving them, as will vindicate it even from the charge of being unkind or unfriendly. <sup>2</sup> Gro-  
tius reduces these reasons to three general heads. First, there may be a reason arising from the nation, which sends them. A nation, which has broken friendship with us by acts of hostility, can have no pretence to charge us with being unkind and unfriendly, if we refuse to receive ambassadours from it; unless they come with proposals of amends: If it has been the practice of a nation to make use of its ambassadours to spirit up our people to rebellion, or to seduce away our manufacturers and artificers; the duty of benevolence does not require us to run the hazard of being treated in the same manner again. Secondly; sufficient reasons against receiving an ambassador may arise from the particular character or circumstances of the person,

<sup>2</sup> Ibid.

who is sent. If he is of a profligate character ; if he has formerly behaved perfidiously towards us, or can justly be charged with having been guilty of any open affronts or insults towards our country in general, or towards the constitutional governours of it in particular ; however unfriendly it might be not to receive any ambassadour from the nation, to which he belongs, there can be no unfriendliness in not consenting to receive him in this capacity. Thirdly ; the business, about which a nation is desirous of sending an ambassadour, may be a reason why he should not be received. For certainly if we know before hand what instructions he is charged with and what business he comes about, there is no more unkindness in refusing to treat about it at all, than in rejecting his proposals after they are made. Grotius informs his readers, that he is here speaking of such, as are called extraordinary ambassadours, who come charged with some particular negotiation : for as to the ordinary ambassadours, that are sent from any nation to attend constantly upon the courts of another nation, not to carry on any particular purpose, but to manage its business generally in those courts and to observe what passes there ; the practice of the antients, who knew of no such officers, has sufficiently shewn us, that they are not necessary : and consequently there is no great occasion for being very scrupulous about refusing admittance to ambassadours of this sort.

<sup>a</sup> Our author's opinion about the personal privileges of ambassadours is, that whilst all other persons, who reside in the territory of any nation, are subject, during the time of their residence there, to the laws of that territory, all nations have by positive agreement made an exception in favour of ambassadours ; that as by one fiction of positive law an ambassadour is considered as

<sup>a</sup> Ibid. § IV.



the representative of the nation, which sends him, so by another like fiction of the same law he is considered as if he was out of the territory, though he is in it. But there is no occasion to have recourse here to any fictions of a purely positive law of nations. An ambassador, who is appointed by a nation to act for it, is made the representative of the nation, as far as his commission extends, by the same law, which would make any one individual in a state of equality the representative of any other individual, who had appointed him to act in his stead. All, that can be called positive in this whole matter, besides the appointment of an ambassador to be the agent of the nation, from which he comes, is the general consent of mankind to consider the collective body of every state as a moral person. For in consequence of this positive consent, every state will naturally be capable of appointing a proxy to act for it: and as the agent or proxy of an individual person, in the liberty of nature, is the representative of that individual by the law of nature; so the ambassador, proxy, or agent of a nation is the representative of that nation by the same law of nature, when this law is applied by positive consent to the collective persons of civil societies. Such a law of nations as this, if we look no farther, will indeed subject every member of one nation, who resides in the territory of another, to the civil law of this territory, as long as he resides there. But if we attend to the act of the nation, which sends an ambassador, and to the act of the nation, which receives him in this character, we shall find, that there is a tacit compact between them, which produces an exception from this general rule in favour of ambassadors, without the aid of any purely positive law; in the same manner, as a compact between two individuals will in respect of the contracting par-

ties produce such mutual rights and obligations, as would not have subsisted by the mere law of nature. When a nation sends an ambassadour, the meaning of this act is, that it sends one of its own members into the territory of another nation to reside there as its own member and to transact such business for it, as it wants to have done there. And the nation, which consents to receive an ambassadour, consents to receive him upon the same terms and in the same character, in which the other sends him. This act therefore, of sending the ambassadour on one part and of receiving him on the other part, amounts to a tacit compact between the two nations, that he shall be considered in the territory of the nation, which receives him, as a member of the nation, which sends him. But if, whilst he resides in the territory of a foreign nation, he is considered as a member of his own; he must be exempted from the jurisdiction of that territory in the same manner as he would be exempted from it, if he had been at home: because if the nation, where he resides, claims any jurisdiction over him, it treats him as one of its own members, and not as a member of the nation from which he comes.

The general consequence from these principles is, that an ambassadour, when he commits any crime, cannot be punished for it by the nation, where he resides, when he commits it. This nation is bound to treat him in all respects, as if he was resident in his own country. But if he had been resident there, it would have had no jurisdiction over him. He can therefore be proceeded against no otherwise, than by a complaint to his own nation, which will make itself a party in his crime, if it refuses either to punish him by its own authority, or to deliver him up to be punished by the offended nation. By supporting the ex-

emption of ambassadours from being punished by the nation, where they reside, upon this principle of compact, we shall be excused from balancing the general utility, which might arise from inflicting punishment upon them according to the laws and by the authority of this state, against the general utility, which arises from such an exemption. It was necessary for Grotius to examine this question about utility; as he supposes the privileges of ambassadours to depend upon a purely positive law established by the common consent of mankind. For where mankind are to give them privileges by positive agreement; one way of finding out what sort of privileges are given them is to find out what sort of privileges will be most beneficial: because mankind are most likely to have agreed to give them such privileges, as will be attended with the most general benefit. But if their privileges arise out of the law of nature applied to civil societies, in consequence of a tacit compact between the nation which sends them, and the nation which receives them; all doubt about the utility of these privileges is out of the question. For though the law of nature is founded in the general utility of mankind, yet no considerations of any utility, which nations might obtain by making their compacts about ambassadours different from what they do make them, will outweigh the general utility, which arises from strictly observing compacts and keeping up to the terms of them, after they are made. When one nation sends an ambassadour to another, the latter is at liberty to receive him upon what terms it pleases, and to model its compact and restrain the ambassadours privileges in such a manner as it judges to be most advantageous. But then it will be necessary for the nation, to which he is sent, to express the particular restraints, which it designs to lay upon his pri-



vileges, and for the other nation to agree to these restraints. For if he is sent generally by the one, as an ambaffadour, and is received by the other in this character without any exprefs reserves; the compact, which is between them, will produce fuch privileges, as we have been defcribing: and the law of nature upon account of the general utility of keeping compacts will take from the nation, to which he is sent, the liberty of departing from the terms of the compact, which it has made, upon account of any utility, that might have accrued to it, if it had made a compact of different terms.

What <sup>b</sup> Grotius fays here about human laws is equally true about human compacts: they admit of an equitable exception in favour of extreme neceffity. But this exception will not affect the privilege, which ambaffadours derive from compact, of not being punished by the state, where they refide, for fuch crimes, as they commit within its territory. For there is no absolute neceffity, that a criminal fhould be punished at all: the law of nature does not enjoin, it only allows, the inflicting of punishment. And there is certainly ftill lefs neceffity, that he fhould be punished by any particular perfon, or at any particular time, or in any particular place. But if an ambaffadour fhould raife and head an infurrection, or fhould otherwife make ufe of open force; it is no breach of the law of nations to oppofe him by force, even though he fhould happen to be killed in the quarrel. Grotius diftinguifhes here between what is done in the way of defence and what is done in the way of punishment. Though the law of nations will not allow an ambaffador's life to be taken away as a punishment for a crime, after it is committed; yet this law, fince it does not authorize him to do what he pleafes, does not oblige the ftate to fuffer him to make ufe of violence without endea-

<sup>b</sup> Ibid.

vouring to stop it. The foundation of this distinction will be evident, if we attend to the principles, which we have been establishing. The law of nature in consequence of our consent to receive any person in the character of an ambassadour, does not exempt him from all civil jurisdiction: it only exempts him from the civil jurisdiction of our state, whilst it supposes him to be subject to the civil jurisdiction of his own. But where this jurisdiction ceases, the compact, by which his privileges are supported, ceases to bind us. This compact, like all others, becomes a nullity, when the matter of it fails. The matter of it is, that he shall be subject to the jurisdiction of his own state and not to the jurisdiction of ours: and consequently the matter of it fails, where the jurisdiction of his own states ceases. This failure does not indeed bring him under our jurisdiction: the only effect of it is to leave us, in respect of him, in the liberty of nature, and to discharge us at the same time from the obligation, that we have laid ourselves under by compact to consider him as under the jurisdiction of his own state. In these circumstances therefore we have the same right to act against him by force, that individuals have to act against one another in the liberty of nature. Now the jurisdiction of his own state fails for a time, where he is attempting to injure us, and our danger is so immediate, as not to allow us time to have recourse to his own state to repress his violence: and consequently in these circumstances we have a right to make use of such natural means of defending ourselves against it, as his conduct makes necessary. But after an injury has been committed; there is no necessity, that the punishment, which he deserves, should be inflicted immediately. And since we have time enough before us to apply to the state, from which he comes; there is, in respect

of inflicting punishment upon him, no failure of the civil jurisdiction, to which by our compact we have allowed him to be subject: and consequently we have no right to inflict punishment upon him ourselves.

<sup>c</sup> Since the privileges of ambassadours are immediately derived from the tacit consent of the nation, which receives them in this character; it is plain, that they have no particular privileges in the territory of a state, through which they are passing, either whilst they are going from home or whilst they are returning thither; because they are not sent to this state as ambassadours, nor received by it in this character. If they meet with any ill usage there, the law of nations takes no other notice of it, than if any other person, who is a member of a foreign state, had met with the same usage.

<sup>d</sup> The attendants and the goods of ambassadors would be subject only to the jurisdiction of their own state, if they were at home: since therefore, whilst they reside with us, they are considered as if they were at home; their attendants and their goods have the same privilege, that they themselves have; that is, the privilege of not being subject to our jurisdiction.

But this privilege of the attendants of an ambassadour who is received by us, is not a privilege, which is any otherwise annexed to their persons, than as they belong to him. As soon as they cease to belong to him, their privileges cease. It is therefore in his power to withdraw their privileges: because it is in his power to discharge them from his service and from all connection with him, whenever he pleases. But whilst they continue to be parts of his family, their offences, like his, are not punishable by our laws. The method of proceeding against them is by applying to him to withdraw his protection. And if he refuses to withdraw it

<sup>c</sup> Ibid. § V.

<sup>d</sup> Ibid. § VIII. IX.



he makes himself a party in their offence ; and application is to be made to the state from which he comes, as if the offence had been his own.

When an ambassadour has contracted any debts in the state, where he resides ; the civil law of that state cannot take his goods from him, and make them over to his creditors, for the payment of such debts : because his goods, as they belong to him, are subject only to the jurisdiction of his own state. The method of recovering what he owes is the same as if it had been a debt of any foreigner, who is resident in his own country, that is, by an application to the state, to which he belongs, and by making reprizals upon the state, if justice is denied.

It will be proper to observe, that in the compact, which produces the privilege of an ambassadour, the nation, which receives him, is a party on one side, and he in his own person and the nation, which sends him, are distinct parties on the other side : the nation, which receives him, tacitly agrees, by the act of receiving him, both with him and with the nation, which sends him, to consider and to treat him, as if he was at home. From hence it follows, first, that though he, by misbehaving himself, breaks this compact, as far as he is a party in it, yet this does not discharge the nation, where he resides, from the obligation, which it is under by the same compact to the nation, from whence he comes. Secondly, it follows from hence, that, where we and any nation have by mutual agreement sent ambassadours to each other, if that nation should use our ambassadour otherwise than the law of nations allows, yet we are not at liberty by way of retaliation to use their ambassadour in the same manner. In such a mutual agreement though their ill treatment of our ambassadour is a breach of compact on their side ; yet it

will not release us from the obligation, that we are under towards their ambassadour by the personal compact with him.

XXI. The compacts of individuals, which are private compacts, have already been treated of at large. But it may be necessary to say something concerning public compacts, which are the compacts of nations. Our author's subject led him to apply the law of nations to compacts of this sort, particularly to such as have relation to war, in more instances, than we shall have occasion to go through. It will be sufficient for our purpose to explain the general principles of this law, and to shew the reader by applying them to a few instances, that there is no other difference in the rules of law or in the rules of interpretation, when they are applied either to public or to private compacts, besides what arises from the difference between individual persons, who are the parties in private compacts, and collective persons, who are the parties in public ones.

Public compacts are either treaties or sponsions.

<sup>f</sup> Public compacts, are divided, in respect of the persons who make them, into treaties conventions, or leagues, and sponsions or engagements.

Treaties, conventions, or leagues, as they are distinguished from sponsions, are made by those, who are authorized by the constitution of a nation to act for it with other nations. But it is not necessary that these constitutional governours should act in their own person. What they do by their deputies, such as envoys, ambassadours, or plenipotentiaries; is their own act; and consequently in respect of the nation it produces the same effect, as if they had done it themselves. In public compacts, which sovereign princes or other constitutional governours of a nation make by

<sup>f</sup> Grot. L. II. C. XV. § III. XVI. See B. I. C. XII. § XVIII.

their deputies or agents, the law of nature is the same, as in promises, which individuals make by proxy : what the deputies do under the authority of their public commission binds their principals ; even though they exceed some private instructions, which their principals had given them.

§ Where the successor of a sovereign prince are chosen occasionally by the people upon every vacancy of the throne, or are appointed by the standing laws of the society ; it is plain that the treaties of the predecessor do not bind them upon account of any immediate authority or power, which he has over them. For since the right, which they have to the crown, is not derived from any act of his, but from the act of the state, he cannot have any immediate authority over them either to limit this right, or to restrain them in the exercise of it. His treaties with foreign nations are made binding upon them by the intervention of the state. He is authorized by the state to act for it in consequence of the office, to which it has appointed him. His acts therefore will bind the state ; because they are in effect its own acts. So that if, upon his demise, no successor was to be appointed and a perfect democracy was to follow ; the public under this new form of government would be obliged to fulfil his treaties. But since his treaties thus effect the state itself ; the right of government, notwithstanding it is transmiited to his successors, not by his own act, but by the act of the state, cannot be transmitted free from the obligation of those treaties, by which the state would have been bound, if it had exercised this right itself without transmitting it to any successor. But the power of sovereign princes thus to bind their successors, by the intervention of the state, is not infinite. Besides the constitutional restraints, which may be laid



upon them by the established form of government, they are under a general restraint arising from the ends of civil union. They are appointed by the state to act for the attainment of these ends, that is, for the security and advancement of the common welfare: and consequently as they are the agents of the state only for these purposes, no treaties of their making; if they are destructive of these purposes, will bind the state. We ought not however to conclude from hence, that the successor of any sovereign prince, who has made a treaty with a foreign power, is at liberty to break that treaty, when he finds, that it would be for the interest of his nation to break it, upon pretence, that the nation could not be bound, and consequently that he cannot be bound, by a compact, which hinders the advancement of the general good. For though a sovereign prince has no power to bind the state and by the intervention of the state to bind his successor to any thing, which is inconsistent with the public good, yet Grotius very properly observes, that this rule is confined to what appears in the first instance to be likely to hinder the public interest, and does not extend to what seemed at first to be of general benefit, though by some unforeseen accident it may become hurtful in the event. If there was a probable cause for making the treaty at first, it was binding from the beginning; and an accidental change of interests, which happens afterwards, will not destroy its obligation.

<sup>h</sup> Sponsions or engagements are compacts made by an inferiour magistrate or officer on the behalf of the state, to which he belongs, without being authorized to act for it. Such compacts, since they are made without the authority of the state, do not bind it, unless it confirms them after they are made. But it is not necessary

<sup>h</sup> L. II. C. XV. § XVI.    L. III. C. XXII. § I. II. III.

that this confirmation should be an express one. The state, to which the sponsors belong, tacitly binds itself to fulfil what they have engaged for on its behalf, by acting under the engagement, as if it understood itself to be obliged. But the notoriety of the engagement and the mere silence of the state about it will not amount to a tacit confirmation of it; as long as the nation or person, with whom the sponsors have treated, is in possession of no corporeal thing and exercises no right in consequence of its engagement. A thing, when it can be claimed by prescription, must have been for some time in the possession of the claimant: and then the true owner by having knowingly neglected to reclaim it is understood to have tacitly relinquished it. If the thing had been all the time in the possession of the true owner, there would be no occasion for him to make any express declarations that the thing is his, in order to keep up his property in it. In like manner where a right is claimed by usage, the person, who claims it, must for some time have exercised it, and they, to whom this right belongs, must knowingly have neglected to stop him in the exercise of it. If he has never exercised it, their silence could be no mark of their intention to give it up to him: for they had neither occasion nor opportunity to speak about it. Now a sponson, whilst it proceeds no farther than a bare compact, does not give the person, with whom it is made, possession of any corporeal thing, and does not imply, that he exercises any right in consequence of it. The notoriety therefore of the sponson and the silence of the state about it, cannot give the person, with whom it is made, any claim upon the state by prescription or usage. The state, whatever it may know of the matter, has no occasion to speak about it, as long as nothing is obtained by it, or nothing is done

in consequence of it. And certainly the silence of the state or its neglect to declare, that it does not consent to the sponſion, whilst there is no occasion to say any thing, or to make any such declaration, is no evidence of its consent to the unauthorized act of some of its members. But if the sponſors, besides their bare compact, have given the person, with whom it was made, possession of some corporeal thing, which belongs to the state; or if that person in consequence of this compact exercises some right, which affects the state; then indeed the knowledge and silence of the state about what has been done, its neglect to reclaim the thing or to stop the exercise of the right, is an evidence of its consent to the sponſion.

If the state, to which the sponſor belongs, neither expressly nor tacitly confirms what he has done, but on the contrary declares, that it will not make good his compact; we are next to enquire what the sponſor himself is obliged to. The compact, if we look no farther, binds him only to endeavour, to the utmost of his power, to prevail upon the state to make it good. He is bound to do this, because it is possible for him to do it: but as far as the state is concerned he is bound to nothing more, because all beyond this is impossible. But if we look farther than the bare compact, we are then to consider, whether the nation or persons, with whom he treated, knew, that he had no commission to act for his own state. If they knew this, he is still obliged only to endeavour to prevail with the state to make his act its own: whatever they may have granted to him in consideration of the compact, which they have made with him, he is not obliged to return that advantage; unless they have particularly stipulated, that he should return it: because they granted it in consideration of a compact,



for the performance of which they knew, that he could not be answerable : and it was their own fault, if they would grant it upon this consideration. But if he led them to suppose, that he had authority to act for the state, either by declaring so in express words, or by treating with them as if he had such authority, whilst they knew nothing to the contrary ; this is a fraud : and the fraud will oblige him, though the compact does not, to make them amends for the advantages, which they have lost, or for the damages, which they have sustained by the compact. If his goods are not sufficient to make them amends, the obligation will extend to his person ; not indeed to his life, for the loss of his life could be no amends to them, but to his labour or to the sale of his labour.

<sup>i</sup> Compacts, which the chief commander of an army or the governour of a town makes with the enemy, are valid, as far as these respective commissions of such officers usually extend : for so far they are understood to be empowered by the state to act for it. The chief commander of an army is authorized by the nature of his commission to exert or to abate the hostile acts of his army in such a manner, as he finds to be most convenient. He is therefore authorized to grant a truce to a town, that he is besieging, or to the army of an enemy, that he meets in the field. For a truce is only the abatement or suspension of hostile acts. But the obligation of this compact includes only himself, and the army, which is under his command ; because his commission reaches no farther. If therefore, during the truce, he and his army should be called away to some other employment, and another commander with another army should be sent in his place ; what he has done does not bind those, who succeed him : so that it will be no breach of faith in them, if they do not

<sup>i</sup> Grot. L. III. C. XXII. § VI. VIII.

observe the truce, that he has agreed upon. But notwithstanding any compact, in which he agrees with the enemy to abate the hostile acts of his army, will bind him and the army; yet if in making that compact he has abused his trust to the advantage of the enemy, he is accountable to his own state for such abuse. The nature of his trust implies, that he has a power to enter into a compact of this sort: and this power is sufficient to render the compact valid. The obligation, that he is under, not to abuse his trust, regards his own state only, and not the enemy; and consequently it cannot affect the validity of the compact, which he makes with the enemy.

<sup>k</sup> The commander of an army, though his office empowers him to grant a truce to the enemy, is not authorized by the nature of his commission, either to make that truce general or to make a peace. His power extends only to the army, which is under his command: a general truce therefore, which is an entire cessation of hostilities between the two nations in all places whatsoever, and a peace, which puts an end not only to all acts of war, but to the state of war between them, are not within the extent of his commission. If compacts, that produce a general truce or a peace, bind the state, when they are made by the commander of an army; the obligation arises, not from the nature of his office, but from some special commission, which the state has given him for these purposes.

Things taken by an army in war, whether they are moveable or immoveable, are in the first instance taken for the state, to which the army belongs. <sup>1</sup> The commander of the army has therefore no right, after they are in his possession, to give them up to the enemy by compact: or if he has any such right, it is derived, not from the nature of his commission, but from some

<sup>k</sup> Grot. *ibid.* § VII.

<sup>1</sup> L. III. C. XXIII. § IX.



occasional customary grant of the state. The rule about persons taken in war is the same as the rule about things. So that the commander of an army has no other right to exchange prisoners with the enemy, than what comes from the special grant or the custom of his country. But he is at liberty to treat with the enemy about such things or such persons, as are not yet in his possession : for the state has no claim upon these. He is therefore obliged to observe the articles, which he has agreed upon with a garrison, that capitulates, in respect either of the town, or the inhabitants, or the soldiery.

The governour of a town is the commander of the garrison, that is, of an army employed for the particular purpose of defending the town. The nature therefore of his trust implies, that his compacts about surrendering the town will bind himself and the garrison. If he surrenders it, when he might have defended it, or upon worse terms, than he might have made, he is accountable to his own state for his misconduct ; but the abuse of his power does not affect any compact, which he makes in consequence of that power.

<sup>m</sup> When the governour of a town, and the garrison, that is with him, in order to save their lives, agree with the besiegers not to bear arms against them or their nation, either for a certain number of years, or for ever ; some have thought this compact to be void, because it is contrary to the duty, which they, who submit to this condition, owe to their country. But Grotius replies, that the duty, which they owe to their country, does not affect this compact ; since they were in the enemy's power and could never have been able to have done their country either military or any other service, if they had not submitted to these terms.

Compacts  
between  
nations at  
peace or  
nations at  
war.

XXII. Public compacts, in respect of the circumstances or condition of the nations, that are parties to them, are divided into such, as are made by nations,

<sup>m</sup> Grot. L. III. C. XXIII. § VII.



that are at peace, and such as are made by nations, that are at war. Treaties of the former sort sometimes relate to the terms or conditions of trade or commerce between the two nations; and then they are called tariffs: sometimes they relate to the assistance, which one nation is to give to the other in war; and then, if no payments are to be made on either side, they are called alliances; or if one nation stipulates to pay for the assistance of the other, they are called treaties of subsidy. In short any rights or obligations, which are consistent with the law of nature, may be produced, and any rights and obligations of the law of nature may be drawn out into view or be ascertained, by express treaties between nations, that are at peace with one another.

Public compacts with an enemy are either such, as suppose the war to continue, or such as put an end to it. <sup>n</sup> Puffendorf has raised a groundless doubt about the obligation of compacts of the former sort. A state of war, he says, implies a liberty of taking all advantages, that we can against our enemy. From whence he concludes, that it is a contradiction to suppose, that a state of war continues, and yet that we are under any obligation of compact towards our enemy. For if on the one hand we are at liberty to take all advantages, that we can, against our enemy; we are at liberty to depart from our compact, whenever we can make any advantage by departing from it; so that our compact does not oblige us: and if on the other hand our compact obliges us to give up such advantages, as we might gain by departing from it, the state of war does not continue; because a state of war implies a liberty of taking all advantages whatsoever against our enemy. This difficulty will be removed, if we distinguish between an absolute state of war, and a state of war un-

<sup>n</sup> B. VIII. C. VII. § II.

der some limitations: an absolute state of war does indeed imply a liberty of taking all advantages, that we can, against our enemy. But we may give up this liberty in part by compact: and yet when we have done this, the state of war will still continue; not indeed in its full extent, but under such limitations, as arise from this compact. For the effect of compacts, which are made between nations, that are at war, and which suppose the state of war to continue, is to abridge the liberty of war without putting an end to it.

° A truce is a compact, by which the persons, who are parties in it, bind themselves not to do any acts of war for a certain time, though the state of war continues. It differs therefore from a compact of peace, as it does not put an end to the state of war. The parties oblige themselves not to do any hostile act during the time, that is agreed upon: but when this time is expired, there is no occasion either for any new declaration of war or for any new causes to justify going on with the war. The truce whilst it lasted, restrained the state of war from producing its proper effects: but as soon as the truce expires, the state of war then exerts itself and produces these effects. Sometimes a truce is called a temporary peace: but when we call it so, we use the word — peace — only in opposition to acts of war, and not in opposition to a state of war.

One reason for enquiring, whether nations continue in a state of war during a truce, is, because there may be some treaties between them, which are limited to times of peace, or some on the other hand, which are limited to times of war; and then it may be a doubt which of these treaties subsist during a truce? To this question Grotius answers, that such compacts only as are limited to times of war, and not such, as are limited to times of peace, will continue in force during a truce.

The chief questions relating to a truce may be easily determined either by considering the nature of the compact itself or by applying to it the common rules of interpretation.

P When a truce is by agreement to continue from some one certain day till another certain day, it may be a question, whether both these days are included in it, if the compact does not say in express words, whether they are to be reckoned inclusively or exclusively. Grotius allows, that the day, which is fixed for the ending of the truce, is to be reckoned inclusively. This day is indeed the limit of the time: but the limits of natural things may be of two sorts; they may either be parts of the thing, as the skin, which is a part of the human body is likewise the limit of the body; or else they may be different from the thing itself and no part of it, as a river, which is the limit of the field or of a meadow, is no part of the field or meadow. But it is most natural to reckon the limit of a thing as a part of the thing itself. He contends however, that the day, from which the truce is to begin, is not to be reckoned inclusively; because the word — from — is disjunctive and not copulative; this word in its usual sense separates the day, which is first mentioned, from the rest and does not join it to them. One would rather think that this first day is the limit of the truce at one end as the last day is the limit of it at the other end; and consequently, that there is the same reason for reckoning the first day, that there is for reckoning the last day as a part of the time, which is included in the truce. Certainly the common use of the word — from — is no objection against this way of reckoning: for when we say from head to foot, the head as well as the foot is included within the reckoning.

Truces, as we have already had occasion to observe, are either general or particular: if the parties agree to suspend all acts of war in all places whatsoever, this is



a general truce ; if they agree to such a suspension in some one or some few places only, the truce is a particular one. <sup>q</sup> When a truce is agreed upon by the constitutional governours of the nations, that are parties in the war, though it binds the whole nation on each side, no acts of war, which are done by the members of either nation, will be a breach of the truce, unless those members knew, that it had been agreed upon : because it can only oblige the whole nation, when it is so promulgated, that the whole nation may know it. Such truces, as are granted by the chief commander of an army are subject to the same rule. But in these truces the rule has no great use ; because they are commonly known immediately to all the persons, who are concerned in them.

<sup>r</sup> Truces may either be absolute or conditional. A truce which is made without any conditions annexed to it, though it binds the parties not to do any hostile acts towards one another, leaves them at liberty to fortify their towns, to raise new armies, to build ships, or in any other respect to put themselves into a better posture of defence, than they were in before. For by agreeing merely not to do any hostile act, they cannot be understood to have bound themselves not to guard, as well as they can, against any future hostile acts, which may be done against them. Conditional truces are broken, when one of the parties does any thing, which is contrary to the conditions, that have been agreed upon. And universally, a breach of truce on one part will justify the other part in beginning hostilities again before the time of the truce would have otherwise expired.

All truces granted for a certain purpose, are confined to this purpose ; and the party, which makes use of the cessation of hostilities, to do any thing, that is not included within this purpose, and that is to the

<sup>q</sup> Grot. Ibid. § V.

<sup>r</sup> Grot. Ibid. § VI. X.

disadvantage of the other party, breaks the truce. For as this purpose is the sole reason of the compact, the right arising from the compact can extend no farther, than this purpose extends. Thus when a truce is granted to a besieged town for the purpose of burying the dead, it is a breach of compact to make use of the opportunity, which such a truce may afford, to bring any new supplies or provisions into the town : the besiegers, as to the garrison a cessation of arms only for the purpose of burying the dead, have a plain right, notwithstanding their compact, to hinder it by force, from making any other advantage of this cessation.

\* Passports, or letters of safe-conduct, which are granted to enemies in time of war, are to be construed by the common rules of interpretation. The nature of a passport does not particularly require, that the words of it should always be understood in their most extensive sense, or that the meaning of it should always be extended beyond the common acceptance of the words, so as to make the favour, which it grants, as complete as possible : whether it is to be interpreted liberally or not, must be determined in the same manner, as if we had any other writing to construe. On the contrary, if there is any difference between the rules of interpreting passports, and of interpreting other compacts, there appears at first sight to be more reason for thinking, that we ought in interpreting passports to adhere closely to the letter of them : because the circumstances of the parties concerned in them, that is, of those who grant them, and of those, to whom they are granted, are such as afford no room to presume, that the former designed to bestow any extraordinary favour upon the latter. However, this is no general rule for the interpretation of passports : it is not necessary, that they should always be interpreted closely ; because

<sup>s</sup> Ibid. § XIV.

though we have no room to presume a design to bestow any extraordinary favour, we must allow those, to whom a passport is granted, as much favour, as they, who granted it, designed to bestow : and consequently we must collect the meaning of the writer, as we collect the meaning of other writers ; from his words only, if they are clear and precise ; or from his words and other signs together, if his words are obscure or ambiguous ; or from other signs only, if there is sufficient reason to believe, that his words do not express his meaning perfectly.

Cartels, which are compacts made between two nations, that are at war, about the exchange or ransom of prisoners, are to be interpreted by the same rules.

There can be no doubt about the obligation of compacts, which put an end to war and restore peace : nor is there any appearance of reason for imagining, that these compacts are to be interpreted by any rules, which are different from the common rules of interpretation. It may however be proper to observe, that whilst <sup>1</sup> Grotius distinguishes between breaking a peace and giving a new occasion for war, the only real difference between them is, that when a nation is said to break a peace, we mean, that it does an injury in respect of the rights, which were acquired or ascertained by some compact of peace ; whereas it is more particularly said to give a new occasion for war, when it does an injury in respect of some other rights. But notwithstanding this difference, breaking of a peace is in effect giving a new occasion for war : because the compact of peace, as it put an end to any former war, took away at the same time all former occasions of war.

Equal and  
unequal  
compacts  
of nations.

XXIII. " If we consider the terms or conditions of public compacts, we may divide them into equal and unequal.

<sup>1</sup> L. III. C. XX. § XVII.    " Grot. L. II. C. XV. § VI. VII.



The matter of equal compacts may either be the benefit of peace, or some other mutual benefit. All compacts are equal, where the inconveniences, which both parties stipulate to bear, or the benefits, which both parties stipulate to receive, are equal. Compacts for restoring peace are equal, if the parties bargain for a mutual restitution of prisoners, or of goods, which they have taken in the war, and for equal security to be given on both sides for preserving the peace. Other equal compacts of mutual benefit relate either to trade and commerce, or to mutual assistance in war, or to any other matter, from whence benefit may arise to the contracting parties.

Public compacts are called unequal ones, when the inconveniencies or the benefits, which they produce to the contracting parties, are unequal. Sometimes the weaker or inferiour party is entitled by the compact to a greater benefit, than the stronger or superiour party; as when a stronger state engages to assist another, that is weaker, and stipulates either for a less assistance or for none in return. Unequal compacts, which lay the greater burden upon the inferiour party, are either such as diminish the sovereign power, which the inferiour nation has over itself, or such as do not diminish this power. If the inferiour nation binds itself not to make war without the consent of the superiour; this condition diminishes its sovereign power: for the power of making war by its own act is a part of the sovereign power of a nation. Grotius goes on to divide the unequal burdens which may be laid by compact upon the inferiour nation, into such as are transient and such as are permanent. Amongst the former sort he reckons an obligation to pay the forces, that the superiour party has employed against it in a war, or the dismantling of its towns, or the giving of hostages, or the yielding up of some part of its territory, or of its military store or of its ships of war: these are called tran-

sient burdens, because they soon end. But the burden will be a continued or permanent burden, if the inferior nation binds itself not to build forts in some particular places, within its own territory, not to go with ships of war or with any other ships into some particular parts of the ocean, or not to keep up more than a certain number of ships: these and many other burdens of the like sort, though they are of indefinite continuence, do not make the inferior state dependant upon the superior for the exercise of its sovereign power. <sup>v</sup> A farther burden of this sort is an obligation of the inferior party to pay a proper respect to the superior and to acknowledge its superiority. This however does not imply a loss or a diminution of sovereign power; provided all the superiority, which it is obliged to acknowledge, is a superiority only of rank or dignity and not of power: for one state may be acknowledged superior to the other in rank or dignity, whilst the latter still continues to govern itself independently of the former.

Compacts  
of the  
same mat-  
ter with  
law of na-  
ture or of  
different  
matter.

XXIV. <sup>w</sup> Grotius observes, that some public compacts are of the same tenor with the law of nature, or contain nothing but what is matter of natural right; whilst others are of a different tenor and produce such rights, as the law of nature would otherwise not have given us. Compacts of the former sort are more particularly useful, where the law of nature admits of some latitude and the precise rights, which arise out of it, depend upon the circumstances that we happen to be in. Express treaties, though in these instances they contain nothing but what is matter of natural right, serve to ascertain such rights, as might otherwise have been controverted. Thus it is matter of natural right, that a neutral state shall not convey any contraband goods to our enemy. But what are, and what are not, to be reckoned contraband goods depends upon such circumstan-

<sup>v</sup> Grot. L. I. C. II. § XXI.

<sup>w</sup> L. II. C. XV. § I.

ces as may leave some room for cavil ; if the several sorts of goods, that are to be reckoned contraband, have not been specified in some express treaty.

This observation of Grotius will furnish us with another, that may be of some use in judging about the law of nature or of nations, from what nations have stipulated with one another in express treaties. Though most nations should at some time or other have made treaties, in which they have stipulated the same thing ; yet we cannot conclude from hence, that what they have thus stipulated is a right of the law of nature or of nations ; because the matter of express treaties is not always matter of natural right. On the contrary, we cannot conclude, that what has been thus stipulated is not prescribed by the law of nations, because express treaties sometimes contain what would have been matter of natural right, though no such treaties had ever been made. We may explain this observation by the instance, which we just now mentioned. If in enumerating the several sorts of contraband goods, any particular sort of goods has been omitted in ever so many express treaties ; this is no evidence, that it is not contraband by the law of nations : because though a neutral state would naturally have had no right in time of war to carry this sort of goods to our enemy, yet we might give it such a right by express treaty ; and any other nations that have ever made any treaties about the like goods may have done the same thing. On the contrary, if in any express treaties we find, that some particular sort of goods has been excepted as not contraband ; this exception is no evidence, that they are contraband by the law of nature : because express treaties are sometimes of the same tenor with the law of nature ; so that the exception may possibly have guarded against nothing, but what the law of nature or of nations, when rightly understood, would have guarded against without it.



## C H A P. X.

Of the changes, that are made in states and in their civil constitutions.

- I. *Three ways, in which civil constitutions are liable to be changed.* II. *Usage may change a civil constitution.* III. *Civil constitutions may be changed by express consent.* IV. *Unjust force does not change a civil constitution in right.* V. *Constitutions may be changed upon failure of supreme governours.* VI. *Abdication may occasion a change in civil constitutions.* VII. *Patrimonial kingdoms are not naturally divisible.* VIII. *Rules of simply hereditary succession.* IX. *Lineally hereditary succession what.* X. *Effect of abdication in lineally hereditary succession.* XI. *Change of constitution upon breach of compact.* XII. *Sameness of a civil society, what it consists in.* XIII. *Several ways, in which a state may cease.* XIV. *Change of constitution does not change a state.* XV. *Some sorts of changes in a state do not destroy it.* XVI. *Variable qualities of a state.* XVII. *Conquest in an unjust war produces no effects of right.* XVIII. *What effects may be occasioned by conquest in a just war.*

Three ways, in which civil constitutions are liable to be changed.

I. <sup>a</sup> **T**HE civil constitutions of all states are established by a compact between the governing part of the state, and the body of the people: and as long as the obligation of this compact continues, neither of the parties in it can of right change the constitution; because the law of nature requires both of them to observe their compact. But this obligation may cease three ways. First; though it cannot be made void by the separate act of either party, yet they may release one another by mutual consent. Secondly;

<sup>a</sup> See B. II. C. IV. § IV. C. VI. § II.

if at any time there is no governing part in being, the obligation will be void; because there can be no compact or no obligation of a compact, where there is only one party. Thirdly; a wilful and notorious violation of the compact on the side of the governours, will discharge the people from their obligation. Upon any of these events the people, that is, the body of the society, will be at liberty, as they were originally, to establish any form of government, that they please.

II. Civil constitutions are ultimately founded in a law, which proceed from the collective body of the state before the legislative power was vested in any particular part of it. But we may argue about them as if they were wholly founded in compact: because a compact between the governing part of the society and the people is the immediate cause, which establishes this law so as to make it binding upon both of them; and whatever alters the terms or conditions of that compact, will likewise alter the tenor of the law, that is established by it.

Usage  
may  
change a  
civil con-  
stitution.

<sup>b</sup> Both the law and the compact, that we are speaking of, are commonly unwritten ones; and usage or continued practice is the only evidence of the tenor of either of them. Whatever constitution therefore might appear from former usage to have been established in any civil society; a different or a contrary usage, after it obtains, will afford the same evidence, that the governours and the people have mutually agreed to change the constitution by releasing one another from the terms or conditions, to which they had obliged themselves by their former compact, and by entering into a new one, in which the terms or conditions are different. Thus an absolute monarchy may become a limited one, or a limited monarchy may become an absolute one, by usage, that is, by the tacit consent of the king and the people.

<sup>b</sup> Grot. L. II. C. IX.

Civil con-  
stitutions  
may be  
changed  
by exprefs  
consent.

III. <sup>c</sup> If the constitutional governours and the people release one another by exprefs consent from the obligation of the compact, by which the old form of government was established; the body of the society will then be at liberty to establish a new one. Or if, without any such antecedent release, the constitutional governours and the people expressly agree to establish a new form of government; this agreement will be a tacit release of both parties from their respective obligation of adhering to the old one: because they cannot intend to bind themselves by a second compact without intending at the same time to set aside the obligation of the first, which, if it still subsisted, would make the obligation of the second impossible.

The legislative body of a state is only one of the parties in the compact, by which the constitution of the state is established: and consequently the acts of this body, though they bind the whole society in other things, will not be sufficient to change the constitution without the immediate and direct consent of the people. In limited monarchies, where the people act in the legislative by their representatives, if we do not attend to this rule, we may be apt to imagine, that as the consent of the representatives is in other instances the consent of the people, so their consent in concurrence with the rest of the legislative body would be sufficient to change the constitution from a limited to an absolute monarchy. But these representatives are a part of the legislative body; and the joint consent of this whole body, though they are included in it, is only the consent of one party in the compact, by which the constitution was established. When a constitution is dissolved by a notorious and willful violation of compact on the part of the civil governours, or by the abdication or other failure of these governours; the people may chuse representatives to act for them

<sup>c</sup> See B. I. C. XII. § IX.



in restoring the old constitution, or in settling a new one : and what these agents, who are chosen and appointed for this purpose, shall do on the behalf of the people, will bind their principals. But agents, who are chosen and appointed by the people to exercise their constitutional share of the legislative power, act under the constitutional compact, and consequently are not authorized by such an appointment to change the terms of this compact.

But what the legislative body of a state does with a design to change the constitution, either in a mixed form of government or in any other form, though it does not in right produce the change, which was designed, may be the occasion of producing it. If the people acquiesce in what the old legislative has done, and submit, without being compelled by force, to act under the new one, as if they approved of it ; this acquiescence and submission is an evidence of their consent.

IV. <sup>d</sup> Unjust force, whether it comes from the civil governours or from the people, can only change a constitution in fact and not in right ; till the power, which has been seized by either party contrary to the constitutional compact, has been given up by the express and free consent of the other. Usage alone is not sufficient to establish a constitution, which has been thus introduced : <sup>e</sup> for usage or prescription will give the possessor no claim either to corporael or to incorporael things, where the first possession is dishonest. And the subsequent consent of the injured party, even though it is express, will do nothing, if any unjust force is made use of to obtain it.

Unjust  
force does  
not  
change a  
constitution  
in  
right.

V. When there are no supreme governours in being, the constitution of government ceases, because the people are then the only remaining party in the compact, by which it was established. Such a failure of supreme

Constitutions may  
be changed upon  
failure of  
supreme  
governours.

<sup>d</sup> See B. I. XII. § XVI.

<sup>e</sup> See B. I. C. VIII § IV.

governours is possible in almost any of the forms of government, but it is most likely to happen in those, which are monarchical either in whole or in part. A monarchy is indeed so far from being a firm and lasting constitution in itself, that it will fail upon the death of the first monarch, \* if such positive provisions are not made for continuing it, as do not arise out of its own nature.

The law by making a kingdom hereditary will preserve the constitution upon the event of the possessors death : for as the ancestor was a party to the constitutional compact, and supported the obligation of it, as long as he lived, so immediately upon his death the law brings the heir into his place and makes this heir a party in it. But the constitution may possibly fail, notwithstanding this provision has been made for the continuance of it. If the family, upon which the law entails the kingly power, is wholly extinct, or if no such heirs are left in it as the law describes ; the people will then be at liberty either to chuse a new monarch, or to introduce a new form of government.

Abdication may occasion a change in civil constitutions.

VI. When the constitutional governours of a state have abdicated or relinquished their power ; there will be no such governours in being : the people therefore will be released from the obligation of the compact, which supported the constitution, and will have a right to alter it, if they think proper.

§ Constitutions, that are monarchical, either in whole or in part, will cease upon the abdication of the present possessor of the kingdom, notwithstanding the law has provided for the continuance of them by making the kingdom hereditary : for by abdicating for himself, he abdicates likewise for his children or other heirs, and cuts them off from the succession. The whole effect of a civil law, which establishes inheritance, consists in transmitting to the children or other heirs what the

\* See B. II. C. IV. § V. VIII.

§ Grot. L. II. C. VII. § XXVI.

ancestor possesses at the time of his death. If he therefore in his life-time has abdicated or relinquished his right, the law will produce no effect at his death; there will be nothing left for them to claim under the law, and nothing left for the law to transmit to them.

If we should be asked here, whether a civil law by making a kingdom hereditary, that is, by appointing an heir to the person, who possesses it at present, will not bring this heir into the right of his ancestor immediately upon the abdication of the ancestor? the terms of the question will supply us with a proper answer to it. A man may have a successor at any time, but he cannot have an heir, till he is dead: for an heir is a person, who succeeds into the right of another, not upon any event whatsoever, but only upon the event of this others death. If the law therefore has done nothing more than make the kingdom hereditary by appointing a succession of heirs, it only provides, that no vacancy of the throne shall happen by the death of the present possessor: a vacancy, that is, made by his abdication, does not come within the view of the law, and no provision is made by it for filling up such a vacancy.

Since an abdication thus dissolves a monarchical constitution, the people are at liberty upon this event either to introduce a different form of government, or to restore the monarchy, either in its former extent or under new limitations. And in whatever shape they restore it, they may grant the kingly power to a new family; or they may pass over the person, who would have been the heir to it, if no abdication had happened, and may grant it to others, who stood more remote than he in the former succession; or lastly they may call him to the throne by express grant, or may suffer him to take possession of it without interruption. But whether he obtains it by grant or by sufferance, his



right is derived from the immediate consent of the people, and not from the operation of the civil law, which had established an hereditary succession, before the abdication of his ancestor.

Hitherto we have argued in this question from our authors principles. But hereditary succession may be either simple or lineal: and Grotius confines these principles to the former sort. He maintains, that a law, which establishes lineal inheritance, will produce a different effect from a law, which establishes simple inheritance; that where lineal inheritance is established the abdication of the ancestor will not affect the heirs, though where simple inheritance is established it will cut them off from the succession. To clear up this matter, it will be necessary for us to take a view of what Grotius says concerning the several rules of succession to kingdoms.

Patrimonial kingdoms are not naturally divisible.

VII. <sup>h</sup> Our author's first rule about the succession to patrimonial kingdoms is, that they are divisible inheritances, that as the present possessor of such a kingdom is empowered to appoint his own heir, so he is not obliged to transmit the kingdom entire to any one person, but is at liberty to divide it into as many parts as he pleases, and to appoint as many successors, as there are parts, with sovereign power over each part. We will enquire presently, whether the state could not give him this power by an express act? or whether the acquiescence or tacit consent of parties will not confirm such a division after it is made, though he had originally no power to make it? The point, that we are to consider now, is, whether a patrimonial kingdom is in its own nature a divisible inheritance? The nature of civil society and of civil power will lead us to think differently from Grotius upon this point. All the parts of a state are united into one body by the social compact,

<sup>h</sup> L. II. C. VII. § XII.

and must remain united, as long as no alteration is made in this compact. But a civil governour cannot change this compact; because he is obliged by the nature of his office to act under it, and consequently he cannot divide the state or separate the parts of it from one another. The civil power, with which he is invested, gives him a right to govern the state; but it only gives him a right to govern it as a state, that is, as a body of men, who are united by compact for the purposes of securing their rights, and of advancing their general benefit.

<sup>i</sup> The tenure, by which this power is helds will not alter the nature of it. If states are indivisible things in themselves the power of governing them, though it should be patrimonial, will not extend to a power of dividing them. The notion of a patrimonial kingdom implies, that the possessor of the kingly power is at liberty to dispose of it, to whom he pleases. But this liberty cannot extend farther, than the nature of the thing, which is to be disposed of, will allow. Where kingly power is the thing to be disposed of, the possessor, though he holds it as a matter of patrimony, can dispose of it only as kingly power, that is, as the power of governing a collective body of men, all the parts of which are united to one another by the social compact.

<sup>k</sup> Grotius allows, that kingdoms, which are made hereditary in intestate succession by any act of the people are indivisible things: because it may be presumed, that the people, when they made such a settlement intended what is most for the common benefit: and the security of the whole will be better provided for, if the state continues entire, than if it was to be divided upon every descent of the civil power into a number

<sup>i</sup> Grot. L. I. C. III. § XI.      <sup>k</sup> L. II. C. VII. § XIV.

of leſſer ſtates. But this reaſon may be applied as well to patrimonial kingdoms as to kingdoms, which are hereditary in inteſtate ſucceſſion. Grotius indeed ſpeaks of patrimonial kingdoms, as if the right of governing them was acquired and tranſmitted independently of the peoples conſent. But by whatever means the kingly power might be acquired, we have ſhewn in another<sup>1</sup> place, that the conſent of the people is as neceſſary to make it patrimonial, as to make it hereditary in inteſtate ſucceſſion. If therefore we may preſume, that a ſtate is an indiviſible thing, where the civil power is made hereditary by the conſent of the people; there is the ſame preſumption, that it is an indiviſible thing, where this power is patrimonial; becauſe it could not be made patrimonial without the like conſent of the people. Or if we ſhould ſuppoſe with our author, that the conſent of the people has nothing to do either in acquiring or in tranſmitting the civil power in patrimonial kingdoms; yet ſtill the ſecurity and common intereſt of all the parts of a civil ſociety, as it is the end of ſocial union, muſt likewise be the end of all civil government: becauſe when a ſociety is formed for any particular purpoſe, it is impoſſible, that the power of governing this ſociety after it is formed, ſhould not have the ſame purpoſe in view. Since therefore our author allows, that the ſecurity and common intereſt of all the parts of a ſtate will require, that it ſhould be indiviſible; the conſequence is, that the civil government of it cannot in its own nature be tranſmitted in ſuch a manner as to divide the ſtate: though the people have not made it indiviſible by any other act, the mere act of ſocial union is ſufficient to make it ſo.

When I ſay, that a patrimonial kingdom is indiviſible in its own nature, I do not mean, that no act whatſoever can divide it. The ſocial compact makes a ſtate one

<sup>1</sup> See B. II. C. IV. § XIV.



indivisible thing in its own nature; and it must continue one thing, as long as this compact subsists without being altered. Now the civil power of governing a state is ultimately founded in this compact: for if there was no such compact, there could be no state, and consequently there could be no civil power. But since the nature of civil power thus presupposes the obligation of the social compact; the person, who is in possession of this power, though he holds it patrimonially, is not authorized by it to alter the terms of this compact. The people however, as they are the parties to this compact, may release the obligation and alter the terms of it by their consent: not indeed without the consent of the person, who is invested with the sovereign power; because he has an interest, that the state should not be divided, and this interest cannot of right be taken from him, unless he agrees to give it up. But there is nothing, which will hinder the state from being divided by the joint consent of him and the people. A state is naturally one thing, as long as the compact, which united the members or parts of it into one body, continues the same in all points; it cannot naturally be divided, till this compact is altered. And though this compact may in part be released by the joint consent of the sovereign governor and of the people; yet since it cannot be so released by the single act of the sovereign governor; a kingdom, though it should be patrimonial, cannot be disposed of as a divisible inheritance by the possessor of it.

Thus whilst Grotius maintains, that a patrimonial kingdom is in itself a divisible inheritance, and cannot be made indivisible without some positive act of the society; the nature and ends of social union and of civil government will rather lead us to conclude on the contrary, that all states, whether the civil power in

them is held patrimonially or otherwise, are indivisible in themselves, and cannot be made divisible without some positive act, in which the people concur to make them so.

Though the possessor of a patrimonial kingdom, if such a tenure of civil power had been any where established, would have a right to appoint his successor by will, or by any other act of his own; yet if he had neglected to appoint a successor, it may reasonably be questioned, whether the kingly power would descend in intestate succession, unless the civil law had made the kingdom hereditary upon failure of such an appointment. For a patrimonial right in the sovereign power, which is an incorporeal thing, is in this respect like the property of an individual in corporeal things: <sup>m</sup> the proprietor of a thing has a right to dispose of it by will; but if he has made no will, neither his children nor any one else can claim it in intestate succession without the aid of positive law. Upon these principles the death of a patrimonial king would put an end to the succession, and the sovereign power would return to the body of the society, from whence it originally came; if he had appointed no heir, and the civil law had not appointed one for him.

If we suppose, what our author takes for granted, that in a patrimonial monarchy the tenure, by which the sovereign power is held, will make it descend as an intestate inheritance without the aid of any positive law, when the last possessor has not appointed an heir; the next question will be, to whom this power will descend? let us suppose, that it will descend to his children; and then the question will be, in what order his children are to inherit? All of them have equal claims: but they cannot all inherit at once. The state cannot be divided amongst them, so that each of them may

<sup>m</sup> See B. I. C. VII. § IV.

have kingly power over a separate part : because a state is in its own nature one indivisible thing. And they cannot inherit this power jointly ; because the constitution is monarchical, by the supposition, and such a joint inheritance of the sovereign power would change it into an aristocracy. Therefore to satisfy their equal claims, they must take one after another. This is the rule in all indivisible things, whether they are corporeal or incorporeal. Thus the several fellows of a college in our universities have an equal right to the common emoluments of their places or fellowships. The rents and other profits arising from the estate of the college are divisible emoluments ; and each of the fellows may receive his respective share of them at the same time, in such proportion as the statutes or customs of the college direct. But the right of succeeding to an ecclesiastical benefice, which is the patronage of the college, is an indivisible emolument : they have all an equal right to succeed to it, when it happens to be vacant, but only one of them can succeed at one and the same time. Therefore to satisfy this right they must succeed to it one after another in that order, which has been established by the local statutes, or by the customs of the college, or by the particular appointment of the donor.

Our author's rule in patrimonial kingdoms, when they become hereditary by accident, is, that each child of the last possessor, whether it is a male or a female, is to succeed according to the order of birth. <sup>n</sup> In kingdoms, which are not patrimonial, but are made hereditary in intestate succession by the act of the people ; he proposes a rule, which is something different from this, and gives a preference to the males before the females, though the males should happen to be younger than the females. He does not inform his readers, why he makes this difference : but the reason, by which he

<sup>n</sup> Grot. L. II. C. VII. § XVII.



supports the latter rule, will help us to conjecture upon what reason he founds the former. In kingdoms, which are made hereditary by the act of the people he says, that the males will be preferred in the succession before the females; because the former are more fit for the business of war and of civil government. But if a view to the security and common interest of the society is what gives a preference to the males before the females in kingdoms, which are made hereditary by the act of the people; we may reasonably conclude, that he gives no such preference in patrimonial kingdoms, which become hereditary by accident, because he supposes, that in the succession to kingdoms of this sort, no regard is to be had to the security and common interest of the society, that nothing is to be considered besides the benefit of the reigning family, and consequently, that the order, which is to be followed in the succession, is the order, which nature has marked out in this family by propriety of birth. But if this was the reason, why he made a difference between the rules of succession in these two sorts of kingdoms, it will not be sufficient to support this difference. For since the security and common interest of the state is the end of social union, it must likewise be the end of civil government: and consequently wherever civil law has given no express directions about the order of succession to the civil power; the succession is to be directed by this principle, as well in patrimonial kingdoms, which become hereditary in intestate succession by accident, as in kingdoms, which are made hereditary by the free consent of the people.

Rules of  
simply hereditary  
succession.

VIII. It will be needless to enquire what the order of succession is, where the law has exactly pointed it out. But if the law has done nothing more, than make the kingly power hereditary in intestate succession,

by transmitting it to the heirs of the last possessor of it without allowing him to dispose of it by will or by any other act of his own ; we are then to enquire what will be the natural operation of such a law.

Hereditary succession, as we have before observed, is either simple or lineal. ° Grotius indeed does not give the name of hereditary succession to the latter sort. But we shall find presently, that lineal succession is hereditary in its own nature, and differs from simple succession only in respect of the order, in which the heirs are placed.

The succession is simply hereditary, if, upon the death of the last possessor of the kingly power, those persons, who are nearest to him in blood, stand first in the order of succession, and all, who are equally near to him in blood, have an equal right to succeed him.

° Our author's first rule about kingdoms which are made simply hereditary in intestate succession by the free consent of the people, is, that such kingdoms are indivisible. But this rule, as we have already proved, is not peculiar to kingdoms of this sort : it extends to patrimonial kingdoms, whether they are disposed of by any act of the last possessor before his death, or become hereditary in intestate succession for want of such a disposition.

° Secondly ; where the civil law calls the head of any family to the succession, and makes the kingly power hereditary in his family ; no persons come within the view of this law, besides such as are descended from him. His collateral relations by affinity or by blood cannot claim to succeed to what was given to him for his personal qualities, and to his family after him either as a reward of his merit, or upon the prospect, that the like personal qualities would be cultivated in that family. Therefore if his direct descendants fail, the

° Ibid. § XXII.

p Ibid. § XIV.

q Ibid. XV.

power, with which he was invested, reverts to the body of the society; notwithstanding there should be some collateral branches left, that descended originally from the same stock with him.

<sup>r</sup> Thirdly; his descendents, if they are not born in such marriage, as the laws of the country have established, cannot claim to succeed him by the aid of the law. A perpetual contract of cohabitation in any other form, though it might be a valid marriage by the law of nature, is not sufficient to give them such a claim: both because they will be liable to contempt upon their mother's account, if she was not thought a fit person to be received as the wife of their father according to the matrimonial laws of the country; and likewise because the state, which has fixed the succession, has a right to as great a degree of certainty, as the nature of the thing will allow of, that the person, who succeeds to the crown, is not spurious; and this degree of certainty cannot be had in the view of the civil law, unless the marriage of the parents is conformable to this law.

<sup>s</sup> Puffendorf observes farther, that in order to take away all suspicion of a supposititious birth, it is the custom in some countries for the queens to be delivered in an open chamber before a large assembly of the nobility or other principal persons of both sexes.

Fourthly; <sup>t</sup> amongst those, who are equally near in blood to the last possessor of the kingly power, the males are to be preferred to the females. The reason of this rule has been mentioned before: in this case, as in all others, which are not provided for by the express directions of the law, regard is to be had to the common interest of the society in interpreting such laws, as relate to the civil government and in determining their operation: and the presumption is, that the males are generally better qualified than the females, not

<sup>r</sup> Ibid. § XVI.    <sup>s</sup> B. VII. C. VII. § XII.    <sup>t</sup> Grot. Ibid. § XVII.



only to defend the society in times of war, but likewise to contrive for its benefit in times of peace.

Under this fourth rule Grotius has occasion to mention substitution, which is an act of the civil law, that brings the child into the place of his deceased parent. We shall find presently, that substitution is of two sorts. But the sort, which takes place in simply hereditary succession, only makes the child by fiction of law as near in blood to the grandfather or other ancestor, as the deceased parent would have been, if he had been living, that is, it places the child in the same degree of proximity to such ancestor, that the deceased parent stood in before his death. Thus suppose, that the last possessor of a kingdom had any number of sons and daughters, that one of these sons died before him, and that the son, who died, left a child, which will in course be the grandchild of the last possessor: then if the civil law has established substitution, this grandchild will stand in the same degree of proximity to the grandfather by the act of the law, that his parents stood in by nature. From hence it follows, that in determining the operation of a civil law, which establishes simply hereditary succession, we are to consider, whether the laws of the country have introduced substitution or not. If substitution is not allowed of, the surviving children of the last possessor of the kingly power are nearer to him in blood than the grandchild; so that they will stand before the grandchild in the succession, and amongst them the males will stand first. But if the law has introduced substitution, the grandchild and the children will be in the same degree of proximity; and consequently as the kingly power can descend only to one of them, if the grandchild should be a male, and the children females, it would descend to the grandchild, and not to one of the children.

Fifthly ; v in simply hereditary succession, amongst the male descendents, who are in the same degree of proximity either by nature or by substitution, or if there are no males then amongst the females, the eldest will stand first in the succession : because, where other circumstances are equal, that person, who has the advantage of age, is presumed to be of more perfect judgment than the rest, and upon this account to be more fit for the business of government : or if all of them are too young to be fit for this important business just now ; yet the person, who has the advantage of age, will be sooner fit for it than the rest.

It is possible, that one person may have the advantage of age, whilst another has the advantage of sex ; that is, one of the female descendents may be older than any of the males : the question then would be, which of these two ought to stand first in the order of succession ; whether the preference is to be given to the female on account of her age or to the male on account of his sex ? Grotius replies, that the advantage of sex is perpetual ; whereas the advantage of age is only temporary. Though the male claimant should not happen to be at present as mature in judgment as the female, yet he will be as mature after some time : whereas the female can never obtain that advantage, in respect of the business of government, which the male derives from his sex. Since therefore a perpetual advantage is to be preferred to a temporary one ; our author determines the question in favour of the younger male.

Lineally  
hereditary  
succession  
what.

IX. The substitution, that we have been speaking of, is of the imperfect sort ; it only brings the child into the same degree of proximity with the deceased parent in respect of the parent's father, who is the child's grandfather ; and then leaves such child, as to the order of succession, in the same place, which its own

sex or its own age gives it. But perfect substitution goes farther, and brings the child in all respects into the place of its deceased parent : the law by this sort of substitution looks upon the child not only to be as near to its grandfather, as its deceased parent was, but likewise puts it into the same place, that its parent was in, as to the order of succession.

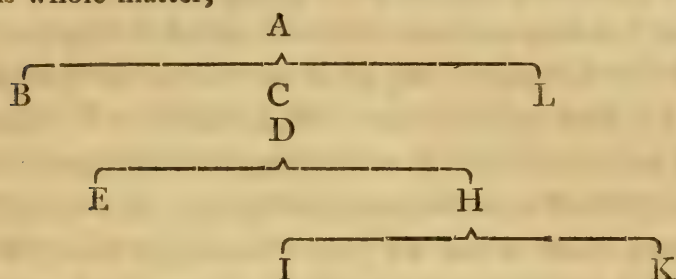
Hereditary succession, which would be simple, if the civil law of the country only allowed of imperfect substitution, will become lineal by means of perfect substitution. Where sovereignty is transmitted according to the order of simple inheritance, the eldest son of the person, who was in possession of it, will succeed to it upon the death of his father, if he survives his father. But if he dies before his father, and his children are brought into his place only by imperfect substitution, though the law will look upon them to be as near to their grandfather as their father was, it will not bring them fully into his place, or will not give them the same rank in the order of succession, that he had : their uncles and aunts, who are the children of their grandfather by blood, will have the same legal right to succeed to their grandfather upon his death, that they have, who are considered as his children by legal substitution ; and amongst the equal claimants the eldest male, whether it is a younger son, or a grandson by the eldest son, will stand first in the order of succession. But perfect substitution brings the children of the eldest son fully into their father's place upon his death ; it makes them in all respects the perfect representatives of their father, and consequently gives them the same rank in the order of succession, that he had. It produces the same effect in respect of his grandchildren or other remoter descendents, that is, in respect of the whole branch or line, which is derived



from him. As he therefore, if he was alive, would stand before his younger brothers ; so his whole line, his children, and grandchildren, and other remoter descendants, whether they are males or females, will stand before those brothers and all their descendants. In this eldest line the males upon every descent will be preferred to the females, who are in the same degree or same part of the line ; and amongst the males, the eldest will be preferred to the rest ; as they are in simple succession : for the only difference between simple and lineal succession is what arises from the difference between perfect and imperfect substitution : and when we have allowed for this difference, both sorts of succession are governed by the same rules. Thus by means of perfect substitution and of a constant preference given to the eldest son, where there is any son, the inheritance will upon every descent be transmitted in the line, which is derived from the eldest son, as long as there are any descendants, in this line, without passing to the younger sons or to any of their descendants. If it should happen, that in any part of this line there are no male heirs, the inheritance will not pass from thence into any other line, in which there are male heirs, but the females, being brought by substitution into the place of their male ancestor, will inherit, and amongst these the eldest will stand first, as in simple succession ; and then the inheritance will be transmitted to the eldest male line, which is derived from her, or if she has no male issue, then to the eldest female line. When no issue either male or female is left in the eldest line, the inheritance passes into the next line : but in determining which is the next line, we are to go no farther than to a line, which is derived from the same immediate ancestor with the last possessor, if there is any such line : for since perfect substitution brings all the descendants of this ancestor fully into his place,

the several lines, which are derived from him, will stand in the succession, as he did, that is, before all his collateral relations, and before all the lines, which are derived from them.

Perhaps the following diagram may help to clear up this whole matter,



First; if A the possessor of sovereign or other civil power has three children B C L, or any other number, of which B the eldest child is a daughter, and the two other children C and L are sons; all these children are by birth in the same degree of proximity to A, or are equally near to him. And upon his death, if they all survive him, and the law has made the power, which he possessed, hereditary, this power will be transmitted by the law to C the eldest male, either in simple or in lineal succession.

Secondly; suppose C to die before A and to leave a son D; then if the law has not established substitution of any sort, B and L will be one degree nearer to A than D is; and upon the death of A, B and L will stand before D in the succession; and of these two L upon account of his sex will stand first. This is hereditary succession without substitution.

Thirdly; if the law has established substitution, it brings the grandchild D into the place of its deceased parent C. But if the substitution is only of the imperfect sort, the law only brings D into the place of C in respect of proximity to the ancestor A, and not in respect of the order of succession. Thus B D and L

being in the same degree of proximity, B and L by birth and D by imperfect substitution; the eldest male amongst them, or the eldest female if there is no male, will stand first in the order of succession upon the death of A. So that if B is a female and D and L are both males; the advantage of sex will place both D and L before B, whether she is older or younger than they; and it will depend upon the comparative ages of D and L, which of these two shall stand first. If D is a male and both B and L are females, D will stand first by the advantage of his sex, of whatever age he is. If there is no male L, and B and D are both females, then the comparative ages of these females will determine their respective places in the order of succession. For though D by the supposition is a grandchild of A by an eldest son C, yet imperfect substitution, which brings D into the place of C, only in respect of proximity to A, does not give the grandchild D that place, which its father had in the order of succession, but leaves D in the place or rank, which its own sex and age will give it, when compared with the sex and age of B and L, who are as near to A by birth as D is by substitution. This is the form of hereditary succession with substitution of the imperfect sort.

Fourthly; if the laws of the country establish perfect substitution, the order of hereditary succession will then be lineal. D the grandchild of A by the eldest son C, will upon the death of C be brought by perfect substitution into the place of C in all respects: the law, by considering D as the perfect representative of C, brings D not only into the same degree of proximity to A, in which C stood, but likewise into the same place in the order of succession. Therefore upon the death of A, the inheritance will by this perfect substitution be transmitted to the grandchild D, in pre-



ference to either B or L, as it would have been transmitted to C, if C had been alive; notwithstanding D should be a female and either B or L should be a male; or notwithstanding D should be a younger male, than either B or L. For perfect substitution, when it has brought the grandchild D into the same degree of proximity to A, in which the deceased parent C stood, does not leave D to take that place in the order of succession, which its own sex or its own age would give it in this degree of proximity, but gives it in all respects the place of its parent C. By the same sort of substitution all the descendants of C, that is, the whole branch of the family, or the whole line, which is derived from C, will be brought up into the place of C, in the same manner with D: and consequently all the descendants in this line will stand before B and L in the order of succession, and before all their descendants. The inheritance upon every descent will be transmitted in the same order. The eldest son will stand before all the other children of the same family, if he is alive, as he would in simple succession; and his children, if he is dead, will in lineal succession be brought by perfect substitution into his place, and the inheritance will be transmitted to them, as it would have been to him; and the eldest male, or, if there is no male, the eldest female amongst them, will stand first. E and H, the immediate descendants of D, are in the same degree or some part of the eldest male line, which is derived from C; that is, they are children of the same parent in this eldest male line; and amongst these the eldest male will stand first, as in simple succession. If therefore E the eldest child is a daughter, and H the younger child is a son, the inheritance will be transmitted to H and to the line; which is derived from him. But if H the son was to die without issue, the

inheritance would be transmitted to E the daughter. Or if E and H are both daughters, then the inheritance will be transmitted to E, who is the elder. Upon either of the events last mentioned, or upon others of the like sort, where there is a failure of male issue in the eldest male line, the inheritance will not pass from thence into any younger male line derived from L, though there should be male issue in this younger line: for E and H and all other children, if there are any other in this part of the line, derived from C and D, are brought by perfect substitution into the place of D; and though amongst these children the eldest male, if there are any males, stands first, yet the females are only postponed, till there are no males; they are not excluded from the succession. If E and H are both males, or if they are both females, so that E, who is the eldest of them stands first in the succession; then upon the death of E without issue, the eldest line derived from D will be extinct, and the inheritance will pass into the next line. But in determining which is the next line, we are to go back, not to any remote ancestor A, but only to the next immediate ancestor, from whom the line, that is extinct, and some other line, that is not extinct, were derived. If therefore the line E, which is supposed to be exhausted, and some other line H, which is not exhausted, but has the heirs I and K in it, were both derived from some immediate ancestor D, the inheritance will pass into the line H, and not into any other line B or L, which was derived from some remoter ancestor A. For all the descendants of the immediate ancestor D are brought by perfect substitution into his place in the order of succession; and consequently as he stood before any of his collateral relations B or L, so his descendant H will stand before them, and before any of their descendants.

In any country, where the law has made the succession to kingly power hereditary, <sup>w</sup> Grotius informs his readers by what means they may be enabled to judge whether this succession is of the simple or of the lineal sort. If the written law of the country has expressly declared what sort of hereditary succession it designed to establish; there can be no room to doubt about this matter. Or if the written law has only established hereditary succession, and has not declared of which sort it shall be; we must be guided by the unwritten law of custom or usage. It can scarce be supposed, in any state, where a monarchy, either absolute or limited, and an hereditary succession to the kingly power have been long established by law, that there has been no custom or usage relative to the descent of kingly power, which will determine whether it is to descend in simple or in lineal succession. But if such a case should happen, we are then to consider, what sort of succession obtains in other indivisible inheritances. Where titles of honour, which are incorporeal things, are indivisible inheritances, and where land, when it descends in intestate succession, is an indivisible inheritance, if the law, which makes them hereditary, transmits them according to the order of lineal succession, this is an evidence, that the law, whenever it speaks of hereditary succession, means lineal and not simple succession. Grotius adds, that if the child of an eldest son, has the same rank or precedence in all public assemblies upon the death of its father, that the father would have had, if he had been alive, this shews us, that the child is brought by perfect substitution into the place of his father, and consequently that the legal succession is of the lineal sort.

\* Lineal succession may either be cognatic or agnatic. The English reader should here be told, that all the

<sup>w</sup> Ibid. § XXII.

<sup>x</sup> Ibid. § XXIII.



kindred of a man, or all, who are derived from the same stock with himself, whether by a male or by a female line, are included in the general meaning of the latin word *cognati* : whereas those only, who are derived from the same stock by a male line, are included in the word *agnati*. From hence he will understand, that the lineal succession, which we have been describing, is cognatic ; as it calls all the descendants in the eldest line to the inheritance, whether they are males or females ; though it postpones the females, and calls the males to the inheritance before them, in the same part of this line. But all females, and all who are derived from females, are excluded from the inheritance in agnatic lineal succession. Therefore in cognatic succession the inheritance will not pass out of the eldest line into the next, as long as any issue, whether male or female, remains in the eldest. But in agnatic succession it will pass out of the eldest line into the next, when all the males, who are derived from males, and exhausted in the eldest, though there should be females or males derived from females still remaining in it.

The operation of civil law, where it establishes lineal succession, is explained by <sup>y</sup> Grotius in a different manner. He agrees with us in maintaining, that in simple succession the law gives the immediate heir only an expectancy of succeeding to the kingdom, and that this expectancy never amounts to a perfect right, till the death of his ancestor brings him into actual possession. But then he contends, that in lineal succession the immediate heir of a kingdom, though he cannot have possession of it in fact, till the death of his ancestor, has possession of it in law, as soon as he is born ; that the law first changes his expectancy into a perfect right of succeeding to the kingdom, and then considering this perfect right, as if it was possession, transmits it

upon his death from him to his descendents, not only if he survives his ancestor and so comes into possession in fact, but likewise if he happens to die before his ancestor, and so never has possession in fact at all. We shall be able to judge, whether the law operates in this manner, if we examine some of the effects, which are produced by it. Let us suppose the possessor of a kingdom to have two or more daughters; the eldest of them, if there was no son born before her, is, at the time of her birth, the expectant heir; where the law has established cognatic lineal succession: and if no son is born afterwards, she will succeed her father in the kingdom. Shall we say here, that this eldest daughter has possession of the kingdom in law from the hour of her birth, that the law changes her expectancy into a perfect right, and will transmit this right to her issue, whenever she dies? If we say this, the consequence will be, that notwithstanding there should be a son born after her, yet this eldest daughter will take the inheritance before him: for the same law, which had improved her expectancy into a perfect right of succession, before he was born, cannot defeat this right afterwards by calling him to the inheritance instead of her. And thus a female would be placed before a male of the same degree by such an operation of law, as Grotius describes. Or shall we say on the contrary, that the law does not improve her expectancy into a right, because it is only an eventual expectancy, and may be defeated by the birth of a son? If we take this part of the alternative, the consequence will be, that she never can have a perfect right at all, as long as her father lives; because so long the birth of a son is a possible event. Let us therefore suppose farther, that this eldest daughter dies before her father and leaves issue, and that her father dies afterwards without having a son; then in

the usual course of cognatic lineal succession one of her children will succeed her father in the kingdom in preference to her sisters and to all their descendants. But the law certainly does not produce this effect by giving her a perfect right to the succession and by transmitting this right to her children upon her death : for it was granted from the beginning, that the law gave her no such right, and consequently it must be granted likewise, that no such right could be transmitted from her to them.

But the common rules of simple succession with the help of perfect substitution will explain this whole matter. Though all the daughters are expectant heirs of their father, yet only one of them can inherit the kingdom ; because it is an indivisible thing : and the advantage of age will give the preference to the eldest. The law therefore, by making the kingdom hereditary, will transmit it to her upon the death of her father, if he dies possessed of it and has no son, and she survives him. Or if she dies before him and leaves issue, perfect substitution will bring this issue up into her place and will enable it to take the inheritance, as she would have taken it, that is, before any of her sisters. Or lastly, if there should be a son born after her, this son will be an expectant heir amongst his sisters, and the advantage of his sex will place him before them all, and before all their descendants, in the order of succession.

We may try, whether our author's principle would produce the proper effects of lineal succession in another example. When the possessor of a kingdom, where lineal succession is established, has a brother ; this brother will have an expectancy of succeeding him in the kingdom, as long as he has no children. But the law cannot from the first improve this expectancy into a



perfect right of succession: because if it did, the brother would stand in the order of succession before any children of the king, that might be born afterwards. Upon our author's principles this consequence, as inconsistent as it is with the order, in which the heirs are placed in lineal succession, cannot be avoided, without affirming, that the expectancy of the brother is not improved by the law into a right of succession, till it appears, that the possessor of the kingdom will have no children. And this answer, whilst it removes one difficulty, will bring on another. It cannot appear with any certainty, whether he will have children or not, till he is dead; so that in the mean time his brother cannot have a perfect right of succession. From hence it will follow, that, if he should have no children, the law, which makes the kingdom hereditary in lineal succession, cannot operate in such a manner, as Grotius imagines. For upon this event the brother will be the heir in lineal succession; and yet he never has a perfect right of succession, or a possession of the kingdom in law, till the law transmits the inheritance to him upon the death of the last possessor and gives him possession in fact. This example may be varied a little by supposing, that the brother has issue, and that the possessor of the kingdom survives him, but dies without issue. The inheritance will then descend in lineal succession to the issue of the brother. But we should be at a loss to explain this descent upon our author's principles. We cannot say, that the brother before his death had a perfect right of succession, and that the law transmits this right to his children, as if it had actually taken effect, or as if he had been in possession of the kingdom; because the consequence of this would be, what has been mentioned already, that the brother in virtue of this perfect right would

have stood first in the order of succession, whether the last possessor had issue or not. Nor can we say consistently with our author's principles, that the law will call the issue of the brother to the inheritance, if the last possessor dies without issue, though it had given the brother no perfect right of succession, and could therefore transmit no perfect right from him to his issue: because our author imagines, that the proper operation of a law, which establishes lineally hereditary succession, consists in giving the expectant heir such a right, whilst he lives, and in transmitting it to his issue, when he dies.

This case may be explained, as the other was, by the common rules of simple succession with the help of perfect substitution. If the possessor of a kingdom dies without issue, his brother will be called to the inheritance according to the common rules of simple succession; though till this event happened he had only an expectancy, and no perfect right of succession, or no possession of the kingdom in law. His children are upon his decease brought into his place by perfect substitution, where the succession is lineal; the inheritance therefore will descend to the eldest male amongst them, as it would have descended to him, if he had been alive. And thus upon the death of the present possessor of the kingdom without issue, the law will give the inheritance to this eldest male, though it had before given him only an expectancy of succeeding, and had not improved this expectancy into a perfect right of succession.

Effect of  
abdica-  
tion in  
lineal suc-  
cession.

X. We may now return to the question, which made it necessary for us to take this view of the operation of civil law in succession to kingdoms.

When <sup>z</sup> Grotius contends, that the abdication of the ancestor will not affect the heir, where the law has established lineal succession, the reader should observe,

that he does not suppose a divine hereditary right, which cannot be defeated by any human act whatsoever, to be inherent in the heir. A right of this sort is inconsistent with his whole opinion about the origin of civil society, and the nature of civil government. He argues therefore only from a right, which he supposes to be vested in the heir by the operation of civil law, where this law has established lineal succession, and contends, that this is such a right, as the abdication of the ancestor will not defeat. In kingdoms of simply hereditary succession he grants, that the abdication of the ancestor will cut the heir off from the succession; because where the ancestor has relinquished his interest in the kingdom, or his legal right of civil government, in his life-time, he cannot transmit that interest or right to his heir. But in lineal succession, he maintains, that the heir has a perfect right of succession given to him by the law, as soon as he is born, and consequently that the abdication of the ancestor cannot affect this right, which he thus derives from the law. But we have just now shewn, that the heir in lineal succession has no other sort of right, than the heir in simple succession; that as the heir in simple succession has only a legal expectancy, during the life of the ancestor, so in lineal succession he has only the like expectancy: for these two sorts of succession do not differ from one another in respect of the right, which the law gives to the heir, but in respect of the substitution, which the law establishes. Where the law has made the kingdom hereditary: if it admits of no substitution at all, or only of imperfect substitution, the succession will be simple: but if it admits of perfect substitution, the succession will be lineal. Since therefore upon the abdication of the ancestor the sovereignty or the regal power will not devolve upon the heir in simple successi-



on, during the life of his ancestor, the consequence is, that upon the like event it will not devolve upon the heir in lineal succession. And thus in either case a vacancy will be made in the throne, and the people will be at liberty to change the constitution. Upon the abdication of the ancestor, perfect substitution will not operate so as to bring the heir immediately into his place and fill the vacancy, before his death. For perfect substitution is in this respect like imperfect substitution; it brings the heir into the place of the ancestor only upon the death of the ancestor, and not before.

When a kingdom is resigned with the consent of the people, the heir may succeed to it immediately, whether the kingdom is simply or lineally hereditary. But this effect is brought about, not by the operation of any former law, that may have made the kingdom hereditary, but by the positive consent of the society obtained upon this occasion and for this purpose. In an absolute monarchy, the immediate consent of the collective body of the society is necessary thus to bring the heir into the place of his ancestor upon a resignation. But in the limited monarchies, where the body of the society acts in the legislative by representatives or otherwise, the consent of the legislative body will be sufficient: for in such forms of government this is a change only of the civil law, that regulates the succession, and not of a fundamental law of the constitution.

Change of  
constitu-  
tion upon  
breach of  
compact.

XI. In those states where the constitution has divided the supreme power between the king and the people, <sup>a</sup> Grotius allows, that the people have a right to resist the king by force, when he invades their part of this power; and then he goes on to observe, that in a civil war which is thus occasioned, the king may lose

his part of the supreme power by the right of war, and consequently that the constitution may be thus changed. The right of war, which he here speaks of, certainly cannot be such a right, as he elsewhere supposes to have been introduced by a purely positive law of nations. For if there is any such law, the rights, which are derived from it, can only take place where nations are the parties in the war: a law of nations, whether it is purely positive or not, relates only to nations in their intercourse with one another, and produces no rights or obligations amongst the parts or members of the same nation. <sup>b</sup> Indeed his whole opinion about a purely positive law of nations, and a right of war arising out of it, is without foundation. War of all sorts is governed by the law of nature only; whether it is a solemn one between different nations, or a civil one between different parts of the same nation. No right therefore either to corporeal or to incorporeal things can be acquired by taking them in war, unless it is acquired by the aid of the law of nature. But since war is only the use of force, the mere taking of a thing in war can give us no right to it; because by the law of nature no effects of right are produced by mere force. If the thing, which we take, was our own before, and we were unjustly kept out of the possession of it; our right to the thing may be maintained, and the possession of it may be recovered, by war: but if we had no such antecedent right arising from some other cause, the mere right of war is no right at all. The consequence of this is, that in shewing how a limited monarch who has invaded that part of the sovereign power which the constitution has reserved to the people, may in a civil war be deprived of the other part, which the same constitution had granted to him, we

<sup>b</sup> See B. II. C. IX. § I. III.

must look farther than a mere right of war, and must enquire, whether the people in these circumstances have not an antecedent right to take it from him. Now that part of the sovereign power, which the monarch has, was granted to him at first by the compact, which settled the constitution, and is holden by him afterwards under the same compact. As long therefore as the obligation of the constitutional compact continues, he has a right to this part of the sovereign power; and the people have no right to take it from him, either by war or by any other means, without his consent. But by wilfully and uotoriously invading the other part he breaks the constitutional compact. And this compact is so far like all other compacts, that a violation of it on his side will leave the people at liberty to chuse, whether they will abide by it or not. A compact, when it is violated by one of the parties, is usually said to be void; but if we speak accurately we should rather say, that it may be made void at the discretion of the other party. Perhaps in the instance which is now before us, those, who dislike monarchical governments of all sorts, may think, that the people will suffer no inconvenience from a failure in the obligation of a compact, by which they had granted any part of the sovereign power away from themselves and had vested it in a king. But it is not worth the while to debate this point with them in the present question: because whatever general rule the law of nature has established in other compacts, the same rule will be applicable to this. And certainly it would in general be a hardship upon one of the parties in a compact, if the obligation of it was to be necessarily void, whenever the other party breaks the conditions of it: for by this means, if the latter did not chuse to comply with any of the claims, which the compact has



given to the former, he would have nothing else to do but to break the compact, and then these claims would cease. This, as it is inconsistent with natural equity, is inconsistent likewise with natural reason: not only because the party, who breaks a compact, might in many instances gain a benefit by his own injustice, if his breach of it would make it void; but likewise because the obligation of a compact, though it arises from the joint will of two parties, might be thus destroyed by the sole will of one of them. However; it is sufficient for our present purpose, that when the compact, by which the people have given their civil governour a part of the sovereign power, is broken on his side, the obligation of it is voidable, or may be set aside, at the discretion of the people. For it will follow from hence, that, as they are at liberty to continue the same constitution, and to leave him in possession of his former power, if they can stop his usurpations either by force or otherwise, so they are at liberty, if they think proper, to release themselves from the obligation of their former compact, and to make such alterations either in the constitution, or in the persons, who are to administer it, as they shall judge to be convenient: they may restore the old form of government, and may call a different succession of persons, either of the same family or of another, to the throne; or they may change the constitution in part by setting new limitations to the power of their future kings, whether they continue the old succession or introduce a new one; or lastly they may change the constitution entirely by establishing a new form of civil government. The people in making these changes may possibly meet with such opposition, as will occasion a civil war, and as cannot be surmounted without conquest. This is all that war and conquest have to do in the matter;

they may be necessary to do that in fact, which the people had otherwise a right to do. Any of these changes therefore, if they can be made peaceably, will be made as effectually in right, as if war had made way for them and conquest had established them. Though Grotius here speaks only of mixed forms of government, these principles are equally applicable to despotic forms. We cannot indeed say, that the people in absolute monarchies have any constitutional part of the sovereign power. But in all forms of civil government they have a right to be free from all unsocial subjection: so that tyranny or unsocial oppression, though it cannot in an absolute monarchy be called an invasion of the peoples part of the sovereign power, will be an invasion of a natural right, which is reserved to them in the constitutional compact. Thus tyranny or unsocial oppression even in despotic forms of government will be a breach of this compact, and will discharge the people from the obligation of it, if they think proper to be discharged.

When the people in a mixed form of government causelessly and unjustly invade that part of the sovereign power, which they have granted and confirmed to their monarch by the constitutional compact; this act of the people cannot of right diminish his power, unless he consents, that it should be diminished: because the people cannot by their own act discharge themselves from the obligation of the compact, that they have made with him. But in the mean time this act of the people, however injurious it may be, will not encrease his power, or will not give him a right to any more power, than the constitution had given him: for since the whole sovereign power was originally vested in the collective body of the society, which I here call the people, he cannot of right claim any greater part

of it, than the people have granted to him by compact in forming the constitution. There is a remarkable difference between the effect of the same wrong, when it is done by the monarch, and when it is done by the people. Upon any failure in the obligation of the constitutional compact, by which a part of the sovereign power was granted to him, this part will revert to the people: because it belonged to them originally, and is holden by him under this compact. When he violates this compact on his side, it is voidable at the discretion of the people: and if they chuse to make it void, his power reverts to them. On the other hand, when the people violate it on their side; it is voidable at his discretion: if he chuses to abide by it, he has no right to any other power, than he derives from it: and if he chuses to make it void; instead of gaining a greater part of the sovereign power, he will lose what he had, and it will, as in the other case, revert to the people. Thus the people may claim to change the constitution, when he invades their part of the sovereign power; whereas he can only claim to continue the constitution, though the people should causelessly and wrongfully invade his part. This is the whole of his right, and no event whatsoever can give him a more extensive right, without the consent of the people. If the struggles between him and them should end in a civil war, and victory should declare itself on his side; yet conquest will not of right encrease his power, however strongly we may put the case in his favour by supposing the breach of the constitution to have begun from the people, and the whole blame of the war to rest upon them; for the use of force, though it should be superior to the force, which is opposed to it, only serves to support a right, which might otherwise have been hindered from taking effect; it does not produce a right, where there was none before.



Sameness  
of a state  
in what it  
consists.

XII. A number of men, though they happen to live near one another, to meet frequently, and to work or to travel together, will be only a herd or company of detached and independent individuals, till they have bound themselves to one another by compact to act jointly under the direction of their common understanding for the preservation of their rights and the advancement of their general interest. The existence of a state begins from the social compact: though the persons, out of which it is formed, might exist before they entered into such a compact; it is this compact, that forms them into a civil society. From hence we may easily discover, what it is that makes any one state different from all others, and what it is that makes any one state at different times the same with itself. Any one state is different from all others; because it had a different beginning of existence, that is, because it began from a different compact. And any one state will at all times be the same with itself; because it had the same beginning of existence, that is, because it began from the same compact.

\* A state in respect of its members is a fluctuating body; some of them are constantly falling off from it by death, and others are as constantly joining themselves to it: so that in a course of years all the members of it will be changed. But if this change is made gradually, the society will remain the same: because the social compact is the same all the time, notwithstanding such a change is made in the persons, who are the parties to it. In a gradual change, though some of the members fall off from the society, yet the same compact subsists amongst those that remain; and the new members, who join themselves to it, become parties in this compact. As others fall off, the same compact is still kept up in the same manner, and will continue to be kept up, though all the old members will

\* Grot. L. II. IX. III.

in a course of years be gone, and the society will consist wholly of new ones. Any subsequent changes, that are made in these new members, will affect the society no otherwise than the former changes affected it. The persons, who are parties in the social compact, will be different ; but the society will continue the same : because these different persons are successively joined to it by the same compact. A society therefore may be a perpetual body, notwithstanding all the parts of it are mortal. It will continue, at long as the same social compact is kept up ; and this compact may be kept up for ever by a constant succession of new members.

XIII. This is the only sense, in which a society can be called a perpetual body. We call it a perpetual body because it may, and not because it must, continue for ever. For though the same compact may be kept up for ever by a constant succession of new members, yet there are several ways, in which it may possibly cease ; and whenever it ceases the society perishes.

Several  
ways in  
which a  
state may  
cease.

<sup>d</sup> First, if all the members of a state are washed away by the sea, or swallowed up in an earthquake, or put to the sword at once ; the society will be destroyed. Where the members drop off gradually, and new ones join themselves to the state, before all the old ones are gone ; the same social compact is kept up by a succession of different persons. But where they all die at once, this compact must necessarily cease ; because there is no succession of persons to keep it up. If the land upon which the society was settled, is left ; as it will be, where all the members are put to the sword ; another company of men, who are united, as they were, into a civil society, may succeed into their place by settling upon the same tract of land. But this new company of men will be a different society ; they only succeed into the possessions of the old inhabitants,

<sup>d</sup> Grot. Ibid. § IV. V. VI.

and not into the same social compact, by which they were united. This compact ended with them; and it is a different compact, that unites the new inhabitants.

Secondly; a state will cease, if all the members of it are brought into perfect servitude. The social compact is destroyed by the slavery of the parties in it: because the obligations of slavery are inconsistent with the obligation of this compact. The members of a civil society are obliged to act under the direction of the public understanding for the security of their rights and for the advancement of the general interest. But when the same persons, who were members of such a society, become slaves, they are obliged to act in all things, as their master shall direct them to act, for his benefit. This latter obligation therefore sets the former aside by rendering it impossible.

Thirdly; a state will cease, if the members of it are so dispersed, that they can neither be directed by a common understanding nor act jointly with a common force for the purposes of civil union. If they are dispersed by means of some external violence; the social compact ceases; because the matter of it is impossible. But if they have dispersed themselves by mutual consent, this compact is dissolved.

Fourthly; a state will cease, if it is subjected as a province to another state. The social compact had originally collected all the parts of it into one body and obliged them to act for the purposes of civil union under the conduct of their own common understanding. This compact therefore ceases, when the society becomes a province: because it then becomes an inferior or subordinate part of another society, and though it is not obliged to pursue any other purposes, yet it is obliged to pursue these under the conduct of a foreign understanding.



The rights, which belong to a civil society, fail or are lost, when the society ceases to exist. And upon the same event the members of it lose their rights. But this is to be understood of those rights only, which belonged to them as members of the society, and not of those, which belonged to them as individuals. The right, which each of them had to his life, to his liberty, to his lands, or to his moveable goods, and other rights of the same sort, are not directly affected by the destruction of the society, of which they were members, however they may happen to be remotely affected. In one case indeed the members of a society, which is destroyed, lose their personal liberty: but this loss, instead of being produced by the destruction of the society, is the cause, why the society perishes.

The same effect, that is produced by the destruction of a society in the rights of the whole collective body and of its several members, will be produced likewise in their respective obligations. Thus the debts of a society are cancelled, when the society perishes; and though the members, whilst the society subsisted, were jointly bound to contribute towards the payment of the public debts, this obligation will cease, when the society subsists no longer. But the destruction of the society, does not cancel any debts, which the members of it had contracted as individuals upon their own private account.

XIV. A civil society continues the same, notwithstanding any changes that are made in its civil constitution. <sup>e</sup> When monarchy is established in a free state, or when on the contrary a popular form of government is introduced instead of a monarchy, it is the constitutional compact that is changed, and not the social compact.

Change of constitution does not change a state.

In the language of the schools the essence of a state consists in its form. An union of men of free condition by compact for such purposes, as we have already

<sup>e</sup> Grot. lib. § VIII.

had frequent occasion to mention, is the form of a state. This union is certainly essential to a state; for there can be no state, where no such union subsists, and wherever such union does subsist, it produces a state. Now a change of the civil constitution of a state is a change of form in the state. And this is sometimes urged to prove, that a change of the civil constitution of a state must be a change of the state itself: because a change of form is a change of essence. But the answer is obvious. A change of civil constitution is a change of the form of government in a state, and not a change of the essential form of the state itself. The several members of the state, notwithstanding the form of government is changed, still continue to be bound by compact, as they were before, jointly to pursue the purposes of civil union, and are still parties in the compact, by which the state was originally produced.

From hence it follows, that a state neither loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government.

Some sorts  
of changes  
in a state  
do not  
destroy it.

XV. When two states unite themselves into one by mutual agreement, so that the several parts or members of each are admitted alike to the same or to similar privileges; neither of them becomes a province to the other, and neither of them is destroyed, by this union. The members of each continue to be joined to one another by social compact, as they were from the first; and their original compact is only changed in part, it is not made void. The only change, that is made, consists in enlarging the terms of this compact on each side, so that the members of each state mutually receive the members of the other into the same body with themselves.

Since both states thus continue in this united body, and neither of them ceases to exist; the rights and the obligations of both will remain, and will become the

rights and obligations of the united body; that is, whatever rights belonged to each state separately, before they were united, will afterwards be the rights of the collective state; and the same obligations, that each state was under separately before, the collective state will be under afterwards.

<sup>g</sup> In monarchies, whether they are absolute or limited, two states may accidentally have the same head. But this unity of head does not join the two states into one. Each state was originally formed by a different compact; and as long as no alteration is made in these compacts, either in whole or in part, the two states will continue to be two distinct bodies. They are not made one merely by being in subjection to the same person: for he is called to govern each of them as a distinct state from the other; and the appointment of him to govern them as two distinct states cannot make them one. Neither has he by means of this appointment an authority to unite them without their direct consent: for he is appointed by each to govern it as a distinct body; and such an appointment cannot imply a power of joining it to the other.

<sup>h</sup> Whilst the same person thus governs two states, one of them, as Grotius says, is not a province to the other, if he is called to govern each by two different appointments; whether these appointments are made by distinct elections, or by the distinct laws of succession, that are established in each. But if by being appointed to govern one he has an immediate right to govern the other, without the aid of any distinct election or any distinct civil law of the latter, then the latter is a province to the former.

<sup>i</sup> Though a number of states should have formed themselves into a system or aggregate body, in order to carry on and secure some particular purpose; it does

<sup>g</sup> Grot. L. I. C. III. § VII.    <sup>h</sup> Grot. L. II. C. IX. § VIII.

<sup>i</sup> Grot. L. I. C. III. § VII.



not follow, that they are united into one state. This union reaches no farther than the particular purpose, for which it was formed : and the several states, after they are thus united, will continue to be as distinct from one another in all other respects, as they were before. Such an union does indeed diminish the independency of each state : because, as far as the purposes of it extend, each state is no longer at liberty to chuse and to act for itself without the concurrence of the others. But this diminution of independency, since it affects all of them equally, will not reduce any of them to the condition of provinces.

<sup>k</sup> When a state by the general consent of the whole body divides itself into two or more states, it does not cease. All the members of it, before this division was made, were united by a social compact into one body ; and after it is made, all the members of each part continue to be united by the same compact. The division only changes this compact in part and does not put an end to it. Before the state was divided, the compact was so general, as to comprehend the individual members of all the parts : but in making the division all the members of each part agree to make it less general and to include only themselves in it.

But if the social compact, by which the whole state was once united, is only changed in part, and is not entirely destroyed, when the state is thus divided ; the right and obligations of the whole state will remain. If these rights and obligations have not been distributed amongst the several parts by special agreement, the rights must be enjoyed, and the obligations must be fulfilled by all the parts in common.

Variable  
qualities  
of a state.

XVI. Some qualities, which we usually speak of as if they belonged to a state, are derived to it from the qualities of its individual members, and are said to be-

<sup>k</sup> L. II. C. IX. § X.

long to the state, only because many of its members are endued with them. <sup>1</sup> Such qualities, as these, are variable; they may either be lost or acquired, though the state remains the same.

The integrity or the valour of a state are qualities of this sort: the state loses its integrity when the members of it become perfidious, and loses its valour, when they become cowardly and effeminate. But by means of a continued succession of members united in the same social compact, the state itself, when it is perfidious and effeminate, is the same that it was before, whilst it was faithful and valiant.

The same thing happens in other societies, that are continued by a succession of different parts, as well as in civil societies: though the societies continue to be the same, the qualities, which they derive from the qualities of their members, may be changed. The same society, which is a learned one now, may hereafter be an illiterate one: the learning of the society is only the learning of its members: it will therefore lose this quality, whenever it is filled with illiterate members. Mankind are indeed very ready to claim a share in the credit of their predecessors: and for this reason, in speaking of any society, of which we are members, we are apt to take in the whole compass of its existence, and to call it a learned or a valiant society; if its members in any former period of time have been possessed of these good qualities; though few or none of them should be possessed of the same qualities now. But where the change has been made the other way, we seldom deceive ourselves in the same manner. When the society, to which we belong, is become learned or valiant, we look no farther back than the present times in speaking of it, and are apt to complain, if any one should so far impute the bad qualities of our predecessors to us, as to call it an illiterate, or

an effeminate and cowardly society, only because it was such in the time of some of our predecessors.

We may reckon guilt amongst the other variable qualities of a state. A disposition to do harm belongs primarily to the individual members, and is no otherwise a quality of the body, than as the body derives this quality from its members. From hence it follows, that a state cannot justly be punished now for any crime, that it committed in some remote period of time. Where there is no guilt, the law of nature does not allow any punishment to be inflicted. No punishment therefore can justly be inflicted upon a state, after none of the members of it, that committed the crime, are left; because in respect of that crime the guilt of the state ceases, as soon as these members are gone.

But the obligation of a state to make reparation for the damage, that it has done, will continue, till reparation is made; though none of the persons, who were concerned in doing the damage, remain in it. Guilt, as it is a personal quality, ceases with the persons of the criminals and does not descend to their successors. But the obligation to repair damage affects the goods of those, who have done the damage, and consequently descends to their successors along with the goods.

Conquest  
in an un-  
just war  
produces  
no effects  
of right.

XVII. Nations, which are conquered in war by a foreign enemy, are sometimes reduced to provinces, or if they continue to be distinct societies, they are sometimes compelled to receive such a form of civil government, or such civil governours, as the conqueror thinks fit to impose upon them. These are the effects, which conquest in war produces in fact, whether the war is just or not. But some of the plainest principles of the law of nature will serve to shew us, that conquest in an unjust war produces no effects in right. Conquest is only the suppressing of a force, which is used against us, by the use of a superiour force on



our side. But all unjust war is only the use of unjust force: and the law of nature gives no effects of right to unjust force, though it should happen to be superior to the force, which is opposed to it.

We might perhaps find reason to determine otherwise upon this question; if there was any purely positive law of nations, by which all public wars, or however all solemn wars, were rendered externally just, as to their effects, and by which the captors might claim whatever they can get into their possession in such wars, whether they are internally just or not. But we have<sup>1</sup> already proved, that there is no such law. And certainly the effects, which conquest even in an unjust war sometimes produces in fact, may be accounted for without supposing, that all nations have ever established such a law by general consent. The desire of power or of profit leads the conqueror to get whatever he can into his possession, and to keep whatever he has gotten. The vanquished nation submits to his will, because it is not able to make an effectual resistance. And if neutral states do not find, that their interest is concerned to stop the growing power of the conqueror, they are not likely to hazard their own safety and the lives of their members, by engaging in the quarrel of the vanquished nation and assisting it to repel or to throw off his unjust usurpation. Thus the ambition or the avarice of one party, the weakness of another, and the caution of a third, will explain the events of conquest, without supposing, that any purely positive law of nations has given the conqueror a right to dominion, has obliged the vanquished state to submit to him, and has restrained all other states from affording it relief.

XVIII. The same principles may be applied to conquest universally; even though it is obtained in a just war. We cannot say, that a conqueror can have no right of civil dominion; merely because he comes

What effects may be occasioned by conquest in a just war

<sup>m</sup> See C. IX, § I, IV.

in by force at first, and continues to hold his power by force afterwards. <sup>n</sup> If he has such a right arising from some other cause, the law of nature will allow him to make use of force to support it, when any opposite force would otherwise hinder it from taking place in fact, and will not vacate the right merely because it is thus supported. But we certainly may say, that no such right can arise out of mere conquest. Though the law of nature allows either states or individuals to bring their rights into execution by force, when they cannot be brought into execution by any other means; yet this law does not produce any right out of mere force, though it happens to be superiour to the force, which is opposed to it.

But where a war is just on the part of the conqueror, he has a right to require reparation of damages; and he has a farther right to punish the nation, that did the injury, which occasioned the war, if this injury proceeded from any public malice or hurtful disposition. And though mere conquest could give him no right of civil dominion over the vanquished nation, yet it may still be a question, whether such a right will not arise out of his right to obtain reparation and to inflict punishment.

There is but little use to be made of some of the principal topics, from which Mr. Lock argues in this question. <sup>o</sup> He contends, that those members of a state, who do not actually concur in the wrong, which is done by the governours of it, are neither liable to punishment, nor obliged to make reparation of damages; but that the punishment and the reparation ought of right to be confined to the governours, and to their direct and immediate assistants or abettors. As far as the members of a society are to be punished individually, we must necessarily grant, that this opinion is true. <sup>p</sup> But in respect of any punishment, which is inflicted upon the body of the state, and affects the in-

<sup>n</sup> Ibid. § XI. <sup>o</sup> V. II. p. 226. <sup>p</sup> See B. II. C. IX. § XIII.

dividual members no otherwise, than as they are parts of this body, and especially in respect of the obligation to repair damages, the law of nations looks upon all the members of it as accessories to the acts of their constitutional governours, and as abettors of their injustice.

Mr <sup>a</sup> Lock contends farther, "that even those members of a state, who have directly concurred in the wrongs done by the civil governours of it, cannot forfeit the full property of their lands or other goods, either in the way of punishment, or in the way of reparation of damages: because nature, which willeth as much as may be the preservation of children, has given their children a right to their land or other goods." But the law of nature, as we have seen in another <sup>r</sup> place, knows nothing of any such indefeasible right in children to inherit the lands or other goods of their parents. Or even if we were to suppose, that the law of nature has established a right of inheritance, yet as long as the parent lives, the children can have only an expectancy of succeeding to his goods, whether those goods are moveable or immoveable; because a right of inheritance is only a right of the heir to take such goods, as the ancestor leaves behind him at his death. Since the parent therefore will leave no goods behind him, if he has been justly disseized of them in his life-time, the child's right of inheritance will fail, that is, it will have no right to inherit any thing. Thus the child's right of inheritance can never be urged to prove that the parent cannot justly be disseized of his goods, because we must first prove, that the parent cannot be so disseized, before we can establish the child's right of inheritance.

But as no use can be made of these principles, so we have no occasion to use them, in shewing, that a conquerors demand to have his damages repaired, will not be sufficient to give him civil dominion over the

<sup>a</sup> V, II. p. 226.

<sup>r</sup> See B. I. C. VII. § IV.



vanquished state without the consent of the people. The damages must be unusually great, if the vanquished state is not able to satisfy the conquerors just demands in money, or in moveable goods, or in both together. And if it is able to make him reparation by such payments as these, he has no farther claim to any property in the lands of its members, and much less to any right over their persons.

Mr. <sup>s</sup> Lock indeed maintains, not only that the damages of an unjust war, will seldom be high enough to give the conqueror any demand upon the land of the vanquished people, but that it is impossible for his just demands to amount to the value of all their land. The calculation has something very extraordinary in it, which makes it deserve the readers notice. This writer sets the whole amount of the damage, that can possibly have been sustained by the conquering nation, at five years product of its land. For a war seldom continues longer than five years, and if it should have continued longer, we cannot suppose the enemy to have destroyed the whole product of the land every year. But there are two general articles left out of this account in the first instance. A just war is sometimes made to obtain reparation of damages, that have been done by the enemy before the war began: and these damages are to be repaired, as well as the damages, which the same enemy does by destroying the yearly product of the conquerors lands, during the course of the war. And from whatever other just cause the war might begin on the part of the conqueror, he has a right to reparation, not only for the damages, which he suffers, but likewise for the expences, that he makes in it. Besides these two general articles Mr. Lock has omitted numberless particular articles in this account, which are included in the damages, that are frequently done in war. When Athens was destroyed

by the Persians, Rome by the Gauls, or Corinth by the Romans; the loss of five years product of the lands of the inhabitants would have born a very small proportion to the loss, which these states had sustained. Small states consist of little more than one capital city; and the damage, that is done to the state by demolishing this one city, is almost irreparable. And when we are calculating the possible damages of a public war, in order to see what effects of right these damages may produce, we are to consider not merely what is likely to happen to such large societies, as mankind are commonly united into at present, but what might possibly happen either in these, or in such small states, as subsisted formerly, and as may subsist again. † Mr. Lock estimates the loss of money or other treasure of the like sort at nothing; for the value of them, he says, is fantastical and imaginary, nature has put no value upon them, and consequently they are of no account by nature's standard. It must be confessed here on the one hand, that the value of money is imaginary; and yet it would be contrary to the common sense of mankind, to affirm on the other hand, that the law of nature would not charge us with doing any damage to a nation, if we should rob its mint or its treasury, because the value of money is imaginary. All the value that any thing can have, must be imaginary, when the thing itself is in its own nature of little or no real use. The value therefore of money, considered merely as metal, is imaginary; because little or no real use can be made of this metal. But if we would determine whether it is to be reckoned of any value, when estimated by nature's standard, we must consider, not only whether it has any real use in itself, but likewise whether it has any real use at all. For the law of nature, as it relates to mankind, sets a value upon whatever is of real use to the owner; whether its uses are derived

† Vol. II. p. 228.

from the nature of the thing itself, or from the labour of mankind, or from their general consent, or from any other accident. A transparent stone or a mass of yellow metal, are not fitted by nature to answer any beneficial purposes: thus far therefore they are worth nothing in nature's account. If the owner should be led by his own fancy to value either of them at the rate of twenty oxen, or of eighty quarters of wheat, this would be only an imaginary value; and the law of nature would take no notice of it, as long as this fancy was peculiar to himself, and no one else was led by the like fancy to rate them at the same value with him, or at any value at all: if he keeps the stone or the metal, they will be of no use to him; and if he is disposed to part with them, no body will give him any thing for them, that will afford him any real benefit. But if mankind in general have the same fancy, that he has, and are led by it to rate the stone or the metal as high as he rates them, the value of them, though it is still imaginary in its origin, becomes real, in the application of them to the purposes of human life, by this accident of its being general. The jewel or the gold, if he keeps them, will do nothing towards answering the calls of nature; but if he is disposed to part with them, the value, which mankind have agreed to set upon them, will enable him at any time to procure a dwelling, food, cloathing, physic, and whatever else he wants, in exchange for them. Besides the loss of money or other treasure of the like sort a nation may suffer much more damage in war than the destruction of the bare product of its lands for as many years as the war continues. Goods, that have been manufactured, are of much more value, than the simple materials, out of which they were made. If the enemy has destroyed woollen or linen cloth; we should not estimate the damages done according to nature's standard, if we were



to set them no higher than the original value of the wool or the flax, that was used in making the cloth. For nature in these and in other instances sets a price upon the labour of the manufacturer: and the value of his labour is in most instances vastly greater, than the value of the original materials, as they came out of the hands of nature. Wool indeed is the immediate product of the live stock of the landholders, and not of the land itself. But Mr. Lock has omitted this whole article of live stock in his account: for certainly the damage, that is done in war to the oxen, horses, sheep, or other animals belonging to the members of a state, is not included in the damage, that is done to the yearly product of their land. Amongst other goods, that are of more value, than the materials, out of which they are made, we may reckon ships of all sorts and naval stores, household furniture, instruments of husbandry, and the tools and other necessary utensils of manufacturers and artificers. When timber that was growing, is destroyed in war; the damage, that is done, does not come under the notion of a loss of the yearly product of the land: timber is indeed the product of land, but not the yearly product of it: a war of one year may waste the product of twenty or forty years in timber. The plundering of a city, even though the buildings are not destroyed, will occasion a farther damage to the state, than the mere loss of goods: the labour of its manufactures will be stopped; and more than five years time may be necessary to bring them together again, and to supply them with materials and instruments for working. Add to all these the immediate damage, that is done to a state by putting a stop to its foreign trade, and the consequent damage, that it will suffer, if the trade, in which it was engaged, should in the mean time take a different course and the state should wholly lose it. After Mr. Lock has thus set the

damages of war too low, he goes on to set the value of land as much too high. He rates the value of land at an hundred times the value of one years product : and consequently, if one years product is worth three rents of the land, the land itself must be worth three hundred years purchase. Nay, what is still more extraordinary, this is the value, which he sets upon the reversion of land : for he does not apply this calculation to shew, that the present possessors of the land cannot be disfeized of it for damages done ; but that the posterity of the wrong-doers cannot be hindered from re-entering upon it at the death of their parents.

Though it is very unlikely, that a nation, which is victorious in the end of a war, should have suffered all these damages, in the course of it ; yet certainly there is a possibility of its suffering so many of them, as may make the demand of reparation fall very little short of the value of the enemy's land. But suppose the value of the damages to be equal to the value of the land of the conquered people ; yet the conquerors demand would give him no immediate right to civil dominion. The state, that he has subdued, is at liberty to transfer its land to other purchasers ; and if it can raise money enough by this means to pay for the damages, that it has done, the demand of the conqueror is at an end. Or if he should seize upon the land for the reparation of damages done ; the conquered people are not obliged to stay upon it and to submit themselves to his will : they may either continue united and seek a new habitation ; or they may disperse by mutual consent, and become members of any other societies, that are willing to receive them. The distress of a state, that has done any great damages, and is compelled by conquest to repair them, may make it more eligible for the people to receive the conqueror for their civil governour, than to try any other expedients ; even though the de-

mand of the conqueror for these damages should not amount to the value of their lands. <sup>v</sup> Such a consent of the people, though they are driven to it by distress, would be binding upon them: for it is not a consent that is extorted by unjust force: the conqueror was doing only what he had a right to do; and a consent, which follows from the use of force, if the force was just, is binding. Thus conquest in a just war may be the remote occasion of acquiring civil dominion; but the immediate cause of it is the consent of the people.

If we carry the conquerors just demand of reparation farther than this, and suppose, what is next to impossible, that it amounts not only to the value of the land, but likewise to the value of the personal service of the several members of the state; such a demand might give him private despotism over the individuals: but this right of the conqueror instead of producing civil dominion would put an end to the state: the several members of it will thus become a family of slaves, but the *collective* body will not be a civil society. To change this family of slaves into a state, the conqueror must manumise them, and they must consent both to form themselves into a civil society, and likewise to accept of the terms, which he offers them, when they are thus united, of allowing him to have civil power over them, in return for the personal liberty, which he grants them.

The punishment of a state, like the punishment of an individual, consists in inflicting some evil upon it in order either to correct a disposition of doing harm, which has appeared from the harm, that it has already done, or to prevent the same disposition from breaking out again in doing the like harm. Amongst the several ways of punishing a state, <sup>w</sup> Grotius, as we have already hinted, mentions the dissolution of it. And there seems to be no room to doubt, but that a society of men,

<sup>v</sup> See B. I. C. VI. § XVI. <sup>w</sup> Grot. L. II. C. XXI. § VII. Sec C. IX. § XIII.



who were united for better purposes, may possibly have shewn by their conduct, that, as long as they continue to act with a joint force, other states can have no effectual security against the harm, which they are likely to suffer from the evil disposition of the individuals, who compose that society. If such a case as this should ever happen, we cannot reasonably doubt about the natural right of mankind in general, and of the neighbouring states in particular, who have been more immediately injured, to dissolve the union, from which they have suffered harm already, and are likely, if it continues, to suffer more. Or rather the social compact will be dissolved in right; when the state is thus become a band of robbers: and we cannot reasonably question, whether the law of nature will allow other states to dissolve a compact in fact, which the same law has before dissolved in right. By such a punishment as this the conqueror, instead of acquiring civil dominion over the state, puts an end to the existence of it. But if the individuals, who were the members of the state before it was dissolved, continue to live near one another; they will have the same opportunity of acting together, after the dissolution of the state, that they had before. There is therefore no way of dissolving a state effectually without inflicting some punishment upon the individual members. \* But no punishment can justly be inflicted upon each of the members individually without distinction, unless all and each have actually assisted, or have directly and immediately concurred, in the general crime of the society: the consent, which they have remotely and indirectly given to the acts of the public in the social compact, though it obliges all and each of them to repair the damages, that the society does, will only make the whole body collectively and not the several members individually liable to punishment. The guilty mem-

\* See C. IX. § XIII.

bers may however be deprived of their lands; <sup>w</sup> and though the general property of these lands, if the society subsisted, would be vested in the society, when the individual proprietors thus lose them, so that the conqueror could not justly seize them and make them his own by occupancy; yet this general claim of the society to all the lands of its territory, that have no private owners, ceases, when the society is dissolved: the conquering nation therefore may acquire property by occupancy in the lands, of which the guilty members are thus deprived, and may grant these lands to new inhabitants, to colonies of husbandmen, manufacturers, and artificers, or to the army, which it employed in making the conquest. But no sovereign power over the state, that was dissolved, or over the innocent members of it, is acquired by this means. Though the remaining inhabitants of the conquered country should incorporate into a civil society with the new colony, this union is made by consent; and neither the leader of the conquering army nor any one else can acquire civil power over this new society without a farther act of consent.

\* Grotius says indeed, that a vanquished nation, which has deserved such a punishment, may be made a province to the nation, that has subdued it. But our author should have shewn, how a nation can consistently with the nature of a civil society be reduced to the condition of a province without its own consent. The weak condition, that it has brought itself into by supporting an unjust war, the distresses, that arise from being compelled to make reparation of damages to the conqueror, and from being farther compelled, in the way of punishment, to dismantle its towns, or to give up its public treasure, or its arms, or its ships of war, may induce the people to consent to become a province of the con-

<sup>w</sup> See B. II. C. III. § XIV. \* See L. II. C. XXI. § VII. See C. IX. § XIII.

quering nation: but without their consent the conqueror has no right to make the vanquished state a province; because he has no right to compel the people to abide by their social compact, and to continue united in one body. It will indeed be a bad alternative when the people must chuse either to become a province, or to dissolve their state by mutual consent. But as they will always be at liberty to chuse the latter part of the alternative, the conqueror can never acquire any right over them as a collective body of men without their own consent.

¶ Upon the whole, though private despotism may arise immediately out of damage done or out of punishment inflicted, without the consent of the individual, who is brought into a state of slavery; yet civil despotism or sovereign power over a state cannot be produced by the same causes without the consent of the collective body of the state. For the several parts or members of a state, are kept together only by a compact, in which none besides themselves are parties. And since a right to obtain reparation, where a state has done damage, or to inflict punishment, where it has committed a crime, does not make the person, who has this right, whether it is an individual person or the collective person of another state, a party in that compact; his right to obtain reparation or to inflict punishment cannot produce a right to insist, that this compact shall be observed, and that the members of such an artificial body shall continue to be united. They are at liberty, notwithstanding his right to release one another from their social compact by mutual consent: and when they have so released one another the notion of civil despotism becomes unintelligible; because the state will then have ceased to exist.

¶ See B. I. C. XX. § IV.

















